

1880.

THE ELECTRICITY & POWER COMPANY, GLENCOE, GA.  
THE TELEGRAPH COMPANY, R. C. GARNER, PRES. AL.  
THE TELEGRAPH COMPANY, R. C. GARNER, PRES. AL.

THE TOWN OF DECATUR.

(29,013)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 463.

GEORGIA RAILWAY & POWER COMPANY, GEORGIA RAILWAY & ELECTRIC COMPANY, R. C. HACKMAN, ET AL., PLAINTIFFS IN ERROR,

vs.

THE TOWN OF DECATUR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

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1 UNITED STATES OF AMERICA, 88:

[Seal of U. S. District Court, N. D. Georgia.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. MacDonald, Jr., and J. C. Gorman, Plaintiffs in Error and Town of Decatur, Defendant in Error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. MacDonald, Jr., and J. C. Gorman, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within — days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Wm. H. Taft, Chief Justice of the United States, the 30 day of May, in the year of our Lord one thousand nine hundred and twenty-two.

O. C. FULLER,  
*Clerk of the District Court of the United States  
 for the Northern District of Georgia.*

Allowed by

M. W. BECK,  
*Associate Justice of the Supreme Court of Georgia,  
 The Chief Justice Being Disqualified.*

Filed in office, May 30, 1922.

Z. D. HARRISON,  
*Clk. Supreme Court of Ga.*

[Endorsed:] Supreme Court of the United States, October Term, 191- Georgia Railway and Power Co. et al., Plff. in Error, vs. Town of Decatur, Deft. in Error. Writ of Error.

3 UNITED STATES OF AMERICA, ss:

To the Town of Decatur, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date of service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of Georgia, wherein Georgia Railway & Power Company and Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in said writ of error mentioned, ought not to be corrected and why speedy justice ought not to be done to the parties in that behalf.

Witness the hand and seal of the Honorable Chief Justice of the Supreme Court of Georgia, this 3d day of May, 1922.

M. W. BECK, [SEAL.]  
*Presiding Justice Supreme Court of Georgia,  
 Chief Justice Fish Disqualified.*

Attest:

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

3½ Due and legal service of the foregoing citation and copy thereof is hereby waived; and all other and further service required by law is likewise waived. This May 30, 1922.

J. HOWELL GREEN,  
FRANK HARWELL,  
HARWELL, FAIRMAN AND BARRETT,  
*Atty's. for Town of Decatur.*

Filed in office May 30, 1922.

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

4 In the Supreme Court of the State of Georgia.

No. —.

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC Co., R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, Plaintiffs in Error,

vs.

TOWN OF DECATUR, Defendant in Error.

From De Kalb Superior Court.

To the Honorable William H. Fish, Chief Justice of the Supreme Court of Georgia:

Now come Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, by their attorneys, and complain and allege:

1.

That on or about the 29th day of April, 1922, the Supreme Court of the State of Georgia made and entered a final order and judgment herein in favor of the Town of Decatur and against Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, in which final order and the proceedings had thereunder in this case, certain errors were committed to the prejudice of Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hack-

5 man, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, all of which will more in detail appear from the assignment of errors which is filed with this petition.

## 2.

That the Supreme Court of Georgia is the highest court of the said State of Georgia in which a decision in this suit and this matter could be had.

Wherefore, Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, petition and pray that writ of error from the Supreme Court of the State of Georgia may issue in their behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

COLQUIT AND CONYERS,  
J. PRINCE WEBSTER,  
ROSSER, SLATON & HOPKINS,  
*Attys. for Petitioners, Plaintiffs in Error.*

The writ of error as prayed for in the foregoing petition is hereby allowed, this May 30, 1922.

The writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of \$250.00.

Dated, Atlanta, Georgia, this 30 day of May, 1922.

M. W. BECK,  
*Presiding Justice Supreme Court of Georgia,*  
*Chief Justice Fish Disqualified.*

Filed in office May 30, 1922.

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

6 In the Supreme Court of the State of Georgia.

No. —.

GEORGIA RAILWAY & POWER Co., GEORGIA RAILWAY & ELECTRIC Co., R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, Plaintiffs in Error,

vs.

TOWN OF DECATUR, Defendant in Error.

From De Kalb Superior Court.

Now come Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of Georgia in the above entitled matter, there is manifest error, to-wit:

1.

Under the undisputed facts in the case, forced compliance by the Railway Companies, plaintiffs in error, with the ordinance of the Mayor and Council of the Town of Decatur, made applicable to said railways, dated April, 1903, binding said railway companies, plaintiffs in error—among other things:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line \* \* \* for one passenger and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur,"

confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Company.

7 (a) The Court erred in not holding said provision unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States.

(b) The Court erred in holding that said provision constituted a contract between the Mayor and Council of the Town of Decatur and the Georgia Railway & Electric Company and Georgia Railway & Power Company, because, (1) neither of said parties had any right,

power or authority to make binding contracts as to fares; (2) said parties are prohibited from making contracts for fixed fares, irrevocable and unlimited as to time, by the Constitution of the State of Georgia, set out in Sections 6389, 6464, 6467 and 6563, of the Code of 1914 of said State.

(c) Said court erred in not holding that if said provision was ever a contract: (1) It had ended prior to the pending suit: (a) By complete performance; (b) by adequate notice of its termination; (c) by the action of the State of Georgia, through the Commission, by which further forced compliance with said five-cents fare was rendered discriminatory and, therefore, illegal and confiscatory; (d) by the action of the State of Georgia, through orders of the Railroad Commission, requiring the giving of transfers on payment of said five-cents fare (thus entitling Decatur passengers to ride over the entire street railway system for five cents, while other passengers, on the same line and for less identical character of service, are required to pay seven cents), and by orders of said body increasing the quality of service over and above that provided for in the claimed contract; (e) by the legislative acts of the State of Georgia (Georgia Acts 1914, page 703, and Georgia Acts 1916, page 681), extending the territorial extent of said five-cents fare provision by extending the corporate limits of the Town of Decatur.

The State Court held that all of said orders and acts of the State were and are legal, valid and binding, and forced compliance therewith. This said construction by the Court of the ordinance of April, 1903, together with forced compliance by said railway companies with said orders and acts of the State aforesaid, render the rate provision of said ordinance invalid and violative of the Fourteenth Amendment to the Constitution of the United States, in that it confiscates the property of plaintiffs in error and denies them the equal protection of the law guaranteed therein.

## 2.

Under the undisputed facts in the case, forced compliance with said ordinance of April, 1903, to-wit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line \* \* \* for one passenger and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur,"

violates the Fourteenth Amendment to the Constitution of the United States as to the individual intervenors in said case, in that it denies to them and all other citizens and patrons, than those leaving or boarding the cars of the street railway companies in the Town of Decatur, the equal protection of the law as therein guaranteed; that said provision of said ordinance, and the action of the State of Georgia by and through the Railroad Commission of said State, and the con-

struction placed upon same by the State court, requires the individual intervenors and all other citizens, persons and patrons (except Decatur patrons) to pay seven cents for the same or less service, while Decatur patrons, for a similar or greater service, are charged only five cents.

## 3.

Because the legislative act of the State of Georgia (Acts of 9 1907, page 73 et seq.), as construed and enforced by the State Court, and amended by the Act of August 18, 1919 (Georgia Laws 1919, page 94) :

(a) Renders said act unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States; in that it denies the plaintiffs in error, individually and collectively, the equal protection of the law and fixes a discriminatory and illegal scheme of rates, in that said act places under the jurisdiction of the Railroad Commission of Georgia the right, power and authority to change rates of fare fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway company having its principal office and operating lines of railroad in counties having a population of less than 75,000 and more than 125,000. There is no legal or reasonable classification with reference to the contracts excepted and those placed under said Commission's jurisdiction, and as a result of said discriminatory exception, the individual plaintiffs in error and all other patrons of the street railway companies, except those boarding or alighting from cars in Decatur, are required to pay seven cents fare, while those boarding or alighting from cars in Decatur pay only a five cents fare.

(b) Said act of 1907 (Georgia Acts 1907, page 73 et seq.) as construed and enforced by the court, violates the Fourteenth Amendment to the Constitution of the United States, in that the court holds that the said act withdraws from the Railroad Commission of Georgia the right, power or authority to change the five-cents fare provision of said ordinance of April, 1903 (as set out in assignment of error No. 1), but holds that said act confers jurisdiction upon said Commission to increase the quality and quantity of service rendered, and empowers the said Commission to require the issuing of transfers upon payment of the fare provided for in said ordinance; 10 and said act, thus construed and enforced, confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Company without due process of law, and denies them the equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c) Said Act of 1907 (Acts 1907, page 73 et seq.), as construed and enforced by the court against the individual intervenors, plaintiffs in error, fixes an illegal and discriminatory scheme of rates, in violation of the Fourteenth Amendment to the Constitution of

therein contained is, under the undisputed facts, confiscatory; and to compel the Georgia Railway & Electric Company and the Georgia Railway & Power Company to continue to operate under and by virtue of the same, and denying them the right to terminate all its lines under and by virtue of said claimed contract and to cease to operate its street railway lines within the town of Decatur, and to compel said street railway companies to permanently devote their property to public use, without any compensation therefor, and to compel them to continue public service in said territory without reference to the value of the service rendered, thus confiscates the property of said companies.

COLQUITT & CONYERS,  
J. PRINCE WEBSTER,  
ROSSER, SLATON & HOPKINS,  
*Attorneys for Plaintiffs in Error.*

Filed in office May 30, 1922.

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

14 In the Supreme Court of the State of Georgia.

No. —.

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC Co., R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, Plaintiffs in Error,

vs.

TOWN OF DECATUR, Defendant in Error.

From De Kalb Superior Court.

Know all men by these presents, That we, Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, as Principals, and National Surety Co. of New York, N. Y., as Security, are held and firmly bound unto the Town of Decatur in the sum of two hundred and fifty Dollars (\$250.00), to be paid to said obligee; the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 30 day of May 1922.

Whereas, The above named Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox,

G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr. and J. C. Gorman, have prosecuted a writ of error in the Supreme Court of the United States to review the judgement rendered in the above entitled action by the Supreme Court of Georgia;

15 Now therefore, the condition of this obligation is such that if the above named Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGIA RAILWAY & POWER  
COMPANY,  
By G. W. BRINE, [SEAL.]

*Its Vice President.*

GEORGIA RAILWAY & ELECTRIC  
COMPANY,

By THOS. K. GLENN, [SEAL.]

*Its President.*

R. C. HACKMAN, [SEAL.]

C. H. KNOX, [SEAL.]

G. R. MACNAMARA, [SEAL.]

J. T. BRASWELL, [SEAL.]

C. A. VIRGIN, [SEAL.]

J. D. MALSBY, [SEAL.]

C. M. BINDER, [SEAL.]

J. L. MURPHY, [SEAL.]

J. R. HARDIN, [SEAL.]

H. M. ASHE, [SEAL.]

P. E. DAVIS, [SEAL.]

C. E. BENNETT, [SEAL.]

W. E. FIELD, [SEAL.]

H. E. HAWN, [SEAL.]

DAVID HAWN, [SEAL.]

F. McDONALD, JR., [SEAL.]

J. C. GORMAN, [SEAL.]

By WALTER T. COLQUITT,

*Atty. at Law and in Fact,*

*Principals.*

NATIONAL SURETY COMPANY,

*Surety.*

By HAROLD BLOODWORTH, [SEAL.]

*Resident Vice-President.*

Attest:

EUNICE ELDER, [SEAL.]  
*Resident Asst. Secretary.*

Signed, sealed and delivered in the presence of:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

GEORGIA,  
*Fulton County:*

On this the 30 day of May, 1922, personally appeared G. W. Brine, an officer of Georgia Railway & Power Company, and T. K. Glenn, an officer of Georgia Railway & Electric Company, and who executed on behalf of said Companies the foregoing bond, and acknowledged that they executed same with full authority.

HUGH W. DOBBS, [SEAL.]  
*Notary Public.*

Notary Public, State at Large, Georgia.  
My Commission expires Sept. 9, 1925.  
My Commission expires: \_\_\_\_\_.

I hereby approve the foregoing bond and surety, this 30 day of May, 1922.

M. W. BECK,  
*Presiding Justice Supreme Court of Georgia,  
the Chief Justice Being Disqualified.*

Filed in office May 30, 1922.

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

17 In the Supreme Court of the State of Georgia.

No. —.

GEORGIA RAILWAY & POWER CO., GEORGIA RAILWAY & ELECTRIC Co., R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, Plaintiffs in Error,

vs.

TOWN OF DECATUR, Defendant in Error.

From De Kalb Superior Court.

The Clerk of the Supreme Court is hereby directed to prepare and certify a transcript of the record in the above entitled cause, for use of the Supreme Court of the United States, by including therein the following:

1. Bill of Exceptions, and Record from the Superior Court of De Kalb County to the Supreme Court of Georgia, including the Brief of Evidence.

2. Opinion and Judgment of the Supreme Court of Georgia in this case, both on interlocutory injunction and final decree.
3. Petition and Writ of Error.
4. Allowance of the Writ.
5. Assignments of Error.
6. Supersedeas Bond.
7. Citation, with Acknowledgment of Service.
8. The Writ of Error.
9. This Praecept and Acknowledgment of Service.

COLQUITT & CONYERS,  
 J. PRINCE WEBSTER,  
 ROSSER, SLATON & HOPKINS,  
*Attorneys for Plaintiffs in Error.*

18 Due and legal service of the above and foregoing Praecept, copy and service thereof, and all other and further service required by law, hereby waived.

This May 30, 1922.

J. HOWELL GREEN,  
 FRANK HARWELL,  
 HARWELL, FAIRMAN & BARRETT,  
*Atty's. for Defendant in Error.*

Filed in office, May 30, 1922.

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

19 Supreme Court of Georgia.

Atlanta, September 27, 1921.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

2359.

GEORGIA RY. & POWER CO. et al.

v.

TOWN OF DECATUR.

This case came before this court upon a writ of error from the superior court of De Kalb county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Judges Meldrim, of the Eastern Circuit, and Wright, of the Rome Circuit, were designated by the Governor and presided on the argument of this case in the place of Atkinson and Hill, JJ.,

who were disqualified. Chief Justice Fish, Presiding Justice Beck, Associate Justices Gilbert and George, and Judges Meldrim and Wright concur in the judgment rendered.

Bill of costs, \$10.00.

Supreme Court of the State of Georgia.

Clerk's Office, Atlanta.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that — — paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

— — — — —  
*Clerk.*

20

Supreme Court of Georgia.

Atlanta, April 29, 1922.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

3019.

GEORGIA RY. & POWER Co. et al.

v.

TOWN OF DECATUR.

This case came before this court upon a writ of error from the superior court of De Kalb county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. Judges Meldrim, of the Eastern Circuit, Wright, of the Rome Circuit, Sheppard, of the Atlantic Circuit, and Bell, of the Albany Circuit, were designated by the Governor and presided in this case in the places of Chief Justice Fish and Associate Justices Atkinson, Hill and Hines, who were disqualified. The Justices and Judges presiding all concur in the judgment rendered.

Bill of costs, \$15.00.

Supreme Court of the State of Georgia.

Clerk's Office, Atlanta.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that — — paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

— — — — —  
*Clerk.*

21

Supreme Court

Nos. 3019 and 3081.

GEORGIA RAILWAY AND POWER COMPAY et al.

v.

TOWN OF DECATUR.

GEORGIA RAILWAY AND POWER COMPAY et al.

v.

MAYOR AND COUNCIL OF COLLEGE PARK.

By the COURT:

1. A judgment of a trial court granting or refusing an injunction, where the same depends upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question.
2. The rulings of the Supreme Court, upon the interlocutory order of the trial judge granting an injunction, become the law of the case as to the particular case.
3. An affirmance by the Supreme Court of the order of the lower court granting a temporary injunction is a ruling upon all questions of law involved, though the legal contentions may not have been specifically enumerated or mentioned in the opinion of the court.

WRIGHT, Judge:

The present case comes up upon the final hearing in the court below. The exceptions are to the rulings sustaining the general demurrers, the declination of certain requests to charge, and the direction of a verdict in favor of a permanent injunction, and the final decree thereon. The case thus comes before the court the second time for review. The first appeal was from the interlocutory order of the trial judge granting a temporary injunction against the plaintiffs in error. A decision therein was rendered September 27, 1921. 152 Ga. 143 (108 S. E. 615). Upon the hearing of this first appeal the court held that the decision of the court in the mandamus case, Georgia Ry. &c. Co. v. Railroad Commission of Georgia, 149 Ga. 1, was controlling upon the questions then under consideration, and a request for a review of the mandamus case was refused by this court; and, immediately following the refusal to review the mandamus case, the court held: "And the court is further of the opinion, that, independently of this ruling as to the case we are asked to review, the Georgia Railway and Power Company was without authority to fix the rate which the

plaintiffs in the court below sought to enjoin; and consequently the court did not err in granting the interlocutory injunction." The effect of this ruling was, that not only the law in the mandamus case was controlling, but that independently, under the questions of law presented in the appeal then under review, the ruling of the trial judge was without error.

While the plaintiff in error now insists that some ten distinct points of attack upon the validity of the contract are made in the present appeal that were not made in the mandamus case (149 Ga. 1), it is not and can not be insisted that the identical questions of law were not involved upon the first hearing of the interlocutory injunction (152 Ga. 143, 108 S. E. 615) as are now involved upon this second appeal.

But it is insisted by plaintiff in error that one question of constitutional objection to the contract, to wit, that it was violative of section 6389 of the Civil Code, "was not raised or pleaded when the case at bar was before this court, \* \* \* and, though discussed in argument, was not considered in the opinion, presumably

23 because it was not then properly before the court." The

question raised upon this constitutional objection, if not clearly stated in the pleadings, was certainly argued fully and exhaustively before the court. Supplemental briefs and reply briefs were filed upon the effect of the constitutional question involved in section 6389 of the Civil Code, and the ruling in the case of *City of San Antonio v. San Antonio Public Service Corporation*, 255 U. S. 547, now cited in support of this very constitutional objection, was then cited and was considered by this court in its ruling.

Upon a careful inspection of the entire record, we are unable to find a question of law or fact that was not involved in the former hearing upon the interlocutory order granting the injunction, or in the mandamus case. The same questions of law are reiterated by amendment, reclothed and elaborated; but it is not difficult, upon a careful inspection, to find that we have met them before.

1. This entire litigation, so often before the courts, has revolved continuously around the single question as to whether the contract between the Georgia Railway and Power Company and the Town of Decatur was a valid, subsisting contract. This question has twice been definitely ruled in favor of the validity of the contract; and the last ruling (152 Ga. 143, 108 S. E. 615) is clearly *res adjudicata*, in our opinion, of the present case.

In the case of *Ingram v. Mercer University*, 102 Ga. 226, 228, 229, Chief Justice Simmons delivering the opinion, this court reaffirmed the decision in the case of *City of Atlanta v. Methodist Church*, 83 Ga. 448, holding that "a judgment of a trial court granting or refusing an injunction, when the same depends entirely upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question." The court in the case

24 of *Ingram v. Mercer University*, supra, said: "Under the equity practice which has prevailed in this State since the passage of the act of October, 1870 (Civil Code, §§5540, 5558), we think

that decision is sound and proper. Under that act many cases are brought to each term of this court, which involve no questions but those purely of law. The trial judge passes upon the same, and either grants or refuses an injunction. For a speedy determination of the matter, the law provides a 'fast' writ of error to this court, and further provides that this court shall advance the same upon its dockets, when requested so to do by either party. This has been the practice since 1870; and as far as we know or can ascertain from consulting our reports, the decisions of this court made upon pure questions of law, upon interlocutory injunctions, have always been regarded as final and controlling upon the trial judge on the final trial before a jury. If it were not so, a great burden has been unnecessarily placed upon this court. A great many of the cases upon these fast writs of error are brought here upon questions purely legal, and this court spends hours, days, and even weeks in investigating those questions; and to say that after all of this labor a decision made in such a case is merely advisory, and does not bind the trial judge or this court in the subsequent litigation between the same parties, seems to us to be absurd. During this term of court a case was brought here from the City of Augusta, involving the acts and contracts of the city and of a street-railway company in that city, under the charter of the city and of the railway company, and certain contracts entered into by the city, the street-railway company and certain steam-railroad companies whose lines ran into the city, involving only the construction of these charters and of these contracts,

25 matters not of fact but of pure law. The decision of these questions occupied this court for days, in order to arrive at the proper construction of the law upon the charters and contracts. According to the contention of counsel for plaintiffs in error, when this case is called for final decree in the superior court, the judge thereof can treat this decision as a nullity, and if the case be brought again to this court, the same grounds may be insisted upon and we will not be bound by the law as declared in that case."

The City of Augusta case, above referred to in the quoted opinion, as an illustration of the reason for the ruling stated, is, upon inspection, a case remarkably similar to the one decided by this court (152 Ga. 143, 108 S. E. 615), and now for review upon a second appeal. Note in connection with the decision in the 102 Ga. 226, the citations of similar authority, as to the rulings upon interlocutory injunctions becoming *adjudicata* upon the second appeal. *Guess v. Stone Mountain Granite &c. Co.*, 67 Ga. 215; *Iverson v. Saulsbury*, 68 Ga. 790, 73 Ga. 733; *Bailey v. Ross*, 68 Ga. 735, 71 Ga. 771; *Conyers v. Gray*, 67 Ga. 329, 70 Ga. 349; *Smith v. Hornesby*, 58 Ga. 529, 70 Ga. 552; *Mayor etc. v. Simmons*, 93 Ga. 477, 99 Ga. 400; *National Bank of Athens v. Carlton*, 96 Ga. 469. See also *Savannah etc. Railway v. Mayor etc. of Savannah*, 115 Ga. 137; *Collins v. Carr*, 116 Ga. 39; *Peak v. Simmons*, 119 Ga. 63.

2. The rulings of the court upon an interlocutory grant of injunction become the "law of the case" upon the final hearing. In the opinion in *Ingram v. Mercer University*, supra, this court said: "In

the case of Iverson v. Saulsbury, Respass & Co., 68 Ga. 790, it appeared that Iverson, as trustee for his wife and her children, obtained an order from the judge at chambers, allowing him to mortgage the trust property for the purpose of supporting and maintaining 26 the cestui que trust. When it was sought to foreclose this mortgage, the cestui que trust filed a bill asking an injunction against the foreclosure, upon grounds therein set out. Upon a demurrer the bill was sustained, the case was brought to this court, and a majority of this court held, Jackson, C. J., dissenting, that "While a chancellor sitting at chambers, on full notice to all parties, may order a sale of trust property, he has no power to grant authority to a trustee to mortgage a trust estate, and a mortgage so given will not bond the cestui que trust." When the case came on for final trial in the superior court, the trial judge followed the ruling of this court. The case was again brought here on that and other matters; and this court held that it was bound by the former decision, that, "although the present bench disapprove of the majority decision stated, it is binding in this case." In the opinion it was said: "Whether this decision be right or wrong, it is the law of the case; it is res adjudicata." The ruling in the previous case was declared to be the law of the case, although in Weems v. Coker, 70 Ga. 748, the court had disapproved and expressly overruled the principle laid down in 68 Ga. 790. While it was not the law of the State at the time the second case (Saulsbury, Respass & Co. v. Iverson, 73 Ga. 733) was decided, yet it shows that this court felt bound to enforce the law as decided when the case was first here on the injunction. They ruled that while not the law generally, it was the law of that particular case." See also 140 Ga. 507, Southern Bell Tel. &c. Co. v. Glawson.

3. As before stated, the sole question at issue upon the former hearing of this case was whether or not the contract between the Georgia Railway and Power Company and the Town of Decatur was a valid, subsisting contract. Its validity was attacked in a number of ways, and many constitutional objections were raised 27 thereto; but when this court reaffirmed the ruling in the mandamus case and held that, independently of the mandamus order, the trial court did not err in granting the interlocutory order, it was an adjudication of every attack upon the validity of the contract in question, even though the numerous objections may not have been specifically ruled upon in the opinion of the court. See, in this connection, McWilliams v. Walthal, 77 Ga. 7; Savannah etc. Railway v. Savannah, 115 Ga. 137; 1 A. L. R. 725; Hughes v. Morrison, 141 Ga. 476; State of New Mexico v. County Commissioners, 1 A. L. R. 720.

In the light of the rulings above stated, we are convinced that this case has had its day in court. The validity of this contract was attacked in the mandamus case heretofore referred to, and in the now case at bar. It has had its day in court and the ruling in the 152 Ga. 143 (108 S. E. 615) is not only res adjudicata of every issue involved in the present hearing, but is the "law of the case" in the case now under review.

What is said in the foregoing opinion as to the case of Georgia Railway and Power Company v. Town of Decatur is applicable to and controlling in the other case, Georgia Railway and Power Company v. Mayor and Council of College Park.

Judgment affirmed. All the Justices concur.

28

Supreme Court.

Nos. 2359 and 2334.

GEORGIA RAILWAY AND POWER COMPANY et al.

v.

TOWN OF DECATUR.

GEORGIA RAILWAY AND POWER COMPANY et al.

v.

MAYOR AND COUNCIL OF COLLEGE PARK.

By the COURT:

Upon request of counsel for plaintiff in error the decision of this court in the case of Georgia Railway & Power Co. v. Railroad Commission of Georgia, 149 Ga. 1 (98 S. E. 696, 5 A. L. R. 1), has been reviewed; and after consideration of the ruling there made, it appears that the requisite number of the Judges now presiding are not in favor of reversing the decision so reviewed, and therefore the ruling there made stands unchanged. This ruling controls adversely to the plaintiff in error the issues presented here. But the court is further of the opinion that, independently of the ruling made in the case referred to, the Georgia Railway and Power Company was without authority to fix the rate which the plaintiffs in the court below sought to have enjoined, and that consequently the court did not err in granting the interlocutory injunction.

WRIGHT, Judge:

The differences arising between the parties in the case under consideration are based more upon legal contentions than upon disputed facts.

On April 1, 1903, the Georgia Railway and Electric Company, through its legally constituted officials, signed an agreement ratifying the terms of an ordinance passed by the Town of Decatur on March 3, 1903, which ordinance provided, among other things, that

29 the street-railway company was "to never charge more than five cents for one fare upon its main Decatur line, referred to as the Rapid Transit Line, for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of same in the Town of Decatur, or from

the terminus of same in the Town of Decatur to the terminus of the same in the City of Atlanta." This written agreement came about as the result of compromise between the parties, growing out of litigation, through which the Town of Decatur sought to enjoin the Georgia Railway and Electric Company from tearing up and removing the line of the Atlanta Railroad Company in the Town of Decatur. The written agreement embodied the consent of the municipality to the removal and discontinuance of the line of the Atlanta Railroad Company, with the stipulation as to fare just quoted. Under this written agreement both parties acted without differences until some time in the year 1918, when the Georgia Railway and Power Company (the lessee of the Georgia Railway and Electric Company) petitioned the Railroad Commission to grant an increase of fare over their main Decatur line. This application was rejected by the Railroad Commission, which held that it was without jurisdiction to grant the increase of fare, under the proviso of the act of August 23, 1907, which prohibited them from interfering with existing rates where there was a valid, subsisting contract. On August 23, 1918, the Georgia Railway and Power Company sought a mandamus to compel the Railroad Commission to take jurisdiction and to act upon the application for an increased rate over the electric line in question. This application was based upon an attack on the validity of the contract between the Town of Decatur and the Georgia Railway and Electric Company. This court upheld the judgment of the lower court denying the mandamus absolute, which was an adjudication that the Railroad Commission was without

jurisdiction because of a valid, subsisting contract between the  
30 parties, to wit, the contract of April 1, 1903. On October 5, 1920, the Georgia Railway and Power Company and the Georgia Railway and Electric Company notified the Town of Decatur that on or after October 20, 1920, the fare on the main or north Decatur line would be seven cents, and that they denied the legality and validity of the so-called contract provision limiting the fare to five cents (set out in the ordinance of the Town of Decatur, March 3, 1903, and an agreement of April 1, 1903, signed by the Town of Decatur and the Georgia Railway and Electric Company). Just prior to the threatened raise in rates the Town of Decatur brought the case now under review, denying the right of the power company and the electric company thus to abrogate the contract of April 1, 1903, setting forth in their petition in detail the facts above stated. The defendant companies in their answer and cross-bill denied the validity of the contract of April 1, 1903, upon numerous grounds, and prayed that it be declared null and void, and that all parties be enjoined and restrained from interfering with it in fixing the rate of seven cents or any other just and non-discriminatory rate upon the Decatur line. After granting a temporary restraining order the judge of the superior court, on December 4, 1920, continued the same of force, and granted the injunction as prayed in favor of plaintiffs and against the defendants. It is to this ruling of the court that exception is taken.

We are of the opinion that the presiding judge was right in granting the injunction as prayed. Under our law the rate of fare upon this and every electric railway company within the State must be fixed by the Railroad Commission, unless there is a valid, subsisting contract made prior to the act of August 23, 1907. The right to fix rates on electric-railway companies' lines is contained in the amendatory act of August 23, 1907 (Acts 1907, p. 72), which 31 carries into effect the provision of the constitution, art. 4, sec. 2, par. 1. Under the act of August 23, 1907, it is provided: "The powers and duties heretofore conferred by law upon the Railroad Commission is hereby extended and enlarged, so that its authority and control shall extend to street railroads and street-railroad corporations, companies or persons owning, leasing, or operating street railroads in this State; provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company." The effect of the constitutional provision and the legislative enactments carrying it into effect was clearly to cover the entire scheme of rate fixing. If there existed, on August 23, 1907, a valid, subsisting contract which fixed the rate, it was conclusive, and neither the Railroad Commission nor either party to the contract can change or alter it. If there was a void contract for any of the numerous reasons urged by plaintiffs in error, then it was not a valid, subsisting contract, and the Railroad Commission only could and should fix a change in the rate. In the instant case the power company is assuming to do what the Railroad Commission refused to do, and what this court has held they were right in not doing, to wit, declare the contract of April 1, 1903, void. Not only this, but the plaintiffs in error are asking this court to now declare the contract void and enjoin all parties from interfering with the power company in fixing a fare of seven cents, or any other just, reasonable, and non-discriminatory rate over the line in question. If this is a void contract, the Railroad Commission alone has the right to change the fare; if it is a valid, subsisting contract, the power company is bound by it. Plaintiffs in error are met at the very threshold with the question of their right to declare void this contract of 1903; but, should we grant to them the right to do so, they are met with what appears to be an unanswerable objection, that the power company has no right to alter, change, or fix a rate differing from the existing rate under which it has been operating their line of railroad since 1903. This power is reserved alone by the constitution to the State, and by legislative enactment is placed in the hands of the Railroad Commission.

Here it is insisted that where the governmental authority fails to exercise its power to control, and where no contract exists, the company has the right to fix its own fares, provided they are just, reasonable, and non-discriminatory. Granting this to be true, it is plain that such condition does not exist. The State of Georgia, in the amendatory act of 1907 referred to, clearly exercised this authority to regulate; and it is no answer to say that an appeal has already been made to the Railroad Commission, and that it has re-

fused for want of jurisdiction. The Railroad Commission disclaimed jurisdiction, not because they were without power to fix rates for electric-railroad companies, but because in the case they had under review they were deprived of that right by the existence of a valid, subsisting contract. Whatever conclusion might be reached as to the validity of the contract of April 1, 1903, it would not affect the conclusion that the power company is without authority to change or fix rates on its electric lines, and this is exactly what it attempts to do, and what the trial court has enjoined it from doing in the instant case.

But the ruling of this court in the case of Georgia Railway and Power Co. v. Railroad Commission, 149 Ga. 1 (98 S. E. 696 5 A. L. R. 1), if unreversed, is conclusive on the issue involved in the instant case. In that case Justice Beck rendering the decision said:

33     "Under the provisions contained in the fifth section of the act approved August 23, 1907, embodied in the Civil Code, § 2662, the railroad commission of this State is without authority to exercise the power conferred and extended by that act, so as to determine or fix fares upon lines of street railroads within the limits of any town or city between which and the street-railroad company operating such lines there was a valid, subsisting contract at the time of the passing of the act. There was such a contract between the City of College Park and the Georgia Railway and Power Company, and between that company and the Town of Decatur as to one line running from Decatur to Atlanta. These contracts were in existence on the 23d day of August, 1907, and are still subsisting contracts. As we decided in the first part of this opinion, these contracts are not invalid, but are valid and subsisting contracts, and were valid and subsisting contracts on the 23d day of August 1907." This decision clearly settles the question that at the time of the execution of this contract both the Georgia Railway and Electric Company and the Town of Decatur had authority to execute the contract of April 1, 1903.

Mr. Justice White, in the case of Southern Iowa Electric Co. v. City of Chariton, 41 Sup. Ct. 400 (255 U. S., —, 65 L. ed. —), held: "Where, however, the public-service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial;" citing Freeport Water Company v. Freeport, 180 U. S. 587, 593 (45 L. ed. 679, 686, 21 Sup. Ct. 493); Detroit v. Detroit City R. Co. 184 U. S. 368 (46 L. ed. 592, 22 Sup. Ct. 410); Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437 (47 L. ed. 887, 23 Sup. Ct. 531); Cleveland v. Cleveland City R. Co., 194 U. S. 519 (48 L. ed. 1103, 24 Sup. Ct. 756); Home Tel. & Tel. Co. v. Los Angeles, 211 U. S. 265, 273 (53 L. ed. 176, 182, 29 Sup. Ct. 50); Minneapolis v. Minneapolis Street R. Co. 215 U. S. 417 (54 L. ed. 259, 30 Sup. Ct. 118); Columbus R. &c. Co. v. Columbus, 249 U. S.

399 (63 L. ed. 669, 6 A. L. R. 1648, P. U. R. 1919D, 239, 39 Sup. Ct. 349).

We have been asked to review and reverse the decision in the case of Georgia Railway and Power Company v. Railroad Commission of Georgia, *supra*; but, upon review the requisite number of the Judges now presiding are not in favor of reversing the decision so reviewed, and therefore the ruling there made stands unchanged. And the court is further of the opinion, that, independently of this ruling as to the case which we are asked to review, the Georgia Railway and Power Company was without authority to fix the rate which the plaintiffs in the court below sought to enjoin; and consequently the court did not err in granting the interlocutory injunction.

What is said as to the case of Georgia Railway and Power Company v. Town of Decatur is also controlling in the case of the Georgia Railway and Power Company v. College Park.

Judgments affirmed. All the Justices concur.

Gilbert and George, JJ., concur in the judgment affirming the grant of the interlocutory injunction, and specially as to the ruling that the contracts between the municipalities and the street-railway company as to fares are valid, because bound by the decision in Georgia Railway and Power Company v. Railroad Commission of Georgia, *supra*.

35

*Bill of Exceptions.*

G. R. & P. Co.

v.

TOWN OF DECATUR.

36 Supreme Court, State of Georgia.

No. —.

GEORGIA RAILWAY & POWER COMPANY and GEORGIA RAILWAY & Electric Co. and R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, Plaintiffs in Error,

vs.

TOWN OF DECATUR, Defendant in Error.

GEORGIA,

*De Kalb County:*

Be it remembered that on the 15th day of December 1921, there came on for trial, and was tried, the case of the Town of Decatur vs. Georgia Railway & Power Company and Georgia Railway & Electric Company, being an application for injunction and being No. 2497

De Kalb Superior Court; said trial coming on before his Honor, Judge John B. Hutcheson, Judge of the Superior Court Stone Mountain Circuit and a jury in De Kalb Superior Court.

Be it remembered that during the pendency of said case and on November 19th, 1920, the following parties applied to his Honor, Judge John B. Gutcheson, to be permitted to be made parties defendant in said cause and to file answers and cross bills therein, said parties being to wit: R. C. Hackman, C. H. Knox, G. R. NacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr. and J. C. Gorman, and that on said date the said Judge permitted the aforementioned intervenors to be made parties defendant as prayed for and by order permitted them to file answer and cross bill in said case, and in obedience to said order and permission said intervenors did file in said cause, after being made parties defendant, as prayed, their answer and cross bill, praying, *inter alia* in said answer and cross bill that the so called contract provisions with reference

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to the Town of Decatur be declared to be illegal, unconstitutional and void.

Be it remembered further that within the time allowed by law, and during the pendency of said cause the Georgia Railway & Power Company and the Georgia Railway & Electric Company duly filed their answer and cross bill in said cause.

On the 7th day of November 1921 said Georgia Railway & Power Company and said Georgia Railway & Electric Company by leave of the court first had and obtained amended their said answer and cross bill, and an additional amendment was filed by said Georgia Railway & Power Company and said Georgia Railway & Electric Company, the same having been allowed and ordered filed by the court on the 10th day of December 1921.

During the pendency of said cause, the Town of Decatur, the defendant in error herein, filed an amendment to their original cause of action and the same was allowed during the trial of said cause.

The Town of Decatur filed demurrers to the answer and cross bill and the several amendments to the answer and cross bill of the Georgia Railway & Power Company and the Georgia Railway & Electric Company, the said demurrers to said answer and cross bill as amended came on for a hearing before his Honor Judge John B. Hutcheson, on the 10th day of December 1921, at which time, after hearing and argument, the General demurrer to said answers and cross bills as amended was sustained and said answer and cross bills of the Georgia Railway & Power Company and the Georgia Railway & Electric Company were stricken, the order of the Judge striking the same being as follows: to wit:

"Upon considering plaintiff's several demurrers to defendants' answer and cross bill, and to defendants' amendments to said answer and cross bill, the same are sustained upon each and every

38

ground of general demurrer therein contained and the said answer and cross bill and said amendments thereto are hereby

stricken and dismissed, except only in so far as said answer contains specific denials or admissions of allegations in the original petition of plaintiff, or states that for lack of information defendants neither admit nor deny the allegations of the petition.

The special grounds of said demurrers are not now passed on. In open court, this December 10th, 1921.

JOHN B. HUTCHESON,  
*Judge Sup. Crt., St. Mt. Circuit."*

Be it further remembered that the Town of Decatur also filed demurrers to the answer and cross bill of the intervenors heretofore set out. Said demurrer came on to be — before his Honor Judge John B. Hutcheson on the 10th day of December 1921, the Court sustaining the general grounds of the demurrer to the intervenors' cross bill and dismissed the same, the order passed thereon being as follows:

"Upon considering plaintiff's several demurrers to the petition or intervention of R. C. Hackman, C. H. Knox, G. R. McNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. R. Davis, C. E. Bennett, W. E. Field, M. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman the same are hereby sustained upon each and every ground of general demurrer therein contained and said petition or intervention is hereby stricken and dismissed. Special grounds of demurrer are not now passed on.

In Open Court this December 10th, 1921.

JOHN B. HUTCHESON,  
*J. S. C., St. Mountain Circuit."*

To the said judgments of the Court sustaining the general grounds of said demurrer and dismissing the answer and cross bill of the Georgia Railway & Power Company and the Georgia Railway & Electric Company as amended, and dismissing the intervention and cross bill of the intervenors as above set out, the

39 Georgia Railway & Power Company and the Georgia Railway & Electric Company and the intervenors, to wit, R. C. Hackman, C. H. Knox, C. R. Macnamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman, the plaintiffs in error herein, then excepted and now except to the same, and then alleged and now allege that the Court committed error in sustaining each and every one of the general grounds of the demurrers and in not overruling each and every one of them upon each and all of the grounds and terms set out in the answer and cross bill and the amendments thereto of the Georgia Railway & Power Co. and the Georgia Railway & Electric Company, and the cross bill and answer filed by the intervenors just above named, and say that the Court erred in not overruling each and every ground of said general demurrers, for that the said answers and cross bills and the amendments thereto of the Georgia Railway & Power Company and the Georgia Railway &

Electric Company set up facts and grounds which would entitle said companies to defeat the action brought by the Town of Decatur and set up by way of cross bill questions of fact and grounds which under the law and State constitutional provisions, and under the law and constitutional provisions of the Constitution of the United States as therein set out would entitle said parties to maintain their said answer and cross bill and to the relief which they sought. And the said intervenors say that the court erred in striking their intervention and cross bill, for the reason that the facts and grounds therein set out and the constitutional provisions, both State and Federal therein contended for entitles said intervenors to maintain their said intervention and cross bill and to the relief therein prayed.

Be it further remembered that during said trial before the  
40 Court and jury on the 15th day of December 1921, the Town  
of Decatur introduced the following testimony:

A.

Introduced in evidence all the writings or documents as set forth in Exhibits A, B, C, D, E, F, G, H, I and J attached to plaintiff's petition and the amendment thereto, it being agreed that the said exhibits were true copies of the purported originals and could be introduced in evidence in lieu of the originals or certified copies.

B.

A Bill introduced in the House of representatives of Georgia on July 22, 1919, seeking to add to Section 2662 of the Code of Georgia, the following:

"Provided, That the above provision, to wit: 'that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company,' shall not apply to any suburban and street railroad company which has its principal office and operates lines of railroad in counties having a population of not less than 75,000 and more than 125,000."

Said bill was passed by the House of Representatives, and reported to the Senate. In the Senate said bill was amended as follows, to wit: "By adding after the word 'Company' in the first section of said act, the words 'And provided that this section shall not operate as a repeal of any existing municipal ordinances.' And also by striking all of Section One after the words 'Population of' and inserting in lieu thereof the words 'of 50,000 or more.'"

The bill thus amended passed the Senate, but was disagreed to by the House. The senate receded from the amendment and the bill as originally drawn was passed.

J. HOWELL GREEN, sworn for the plaintiff testified as follows:

41 "The said Georgia Railway & Power Company has an office in the Town of Decatur, in the County of De Kalb, and has an agent in charge of said office.

The Atlanta Railway Company line referred to in paragraphs 7 and 8 of the petition ran from the Town of Decatur to Atlanta north of but practically parallel with the said main Decatur line, formerly known as Rapid Transit line, the total length of said line which was discontinued, including the loop in the Town of Decatur, being about three miles.

That the said contract with the Town of Decatur attached to the petition as Exhibit "B" was first executed in the City of Atlanta, as appears from said contract, by the Georgia Railway & Electric Company, and was then carried to the Town of Decatur and there executed by the Mayor and Clerk of the Council of the Town of Decatur, and delivered to said Mayor and Council in the Town of Decatur in County of De Kalb, and was left for record, and was recorded in the office of the Clerk of the Superior Court of De Kalb County.

That subsequent to the execution of the contract attached to plaintiff's petition as Exhibit "B" said Georgia Railway & Electric Company, extended its double-track from the City of Atlanta to the Town of Decatur, and into the Town of Decatur along Railroad Avenue, now known as Howard Street, all of which was within the five years prescribed in said contract.

Since the execution of the contract attached to plaintiff's petition as Exhibit "B" I have continuously resided in said Town of Decatur, and have boarded the cars of the Georgia Railway & Electric Company and the Georgia Railway & Power Company at every station on said Main Decatur line within the limits of the Town of Decatur, not only as they existed in April 1903, but as now extended, and never been charged more than five cents on any of the cars of the Georgia Railway & Electric Company or the Georgia Railway &

42 Power Company for one fare from any point within the Town of Decatur to the terminus of said line in the City of Atlanta, and have always been given transfers upon payment of one fare of five cents when requested.

During said period from April 1, 1903, and up to the present time the Georgia Railway & Electric Company and the Georgia Railway & Power Company have charged and collected a five cent fare upon said North Decatur line from all points within the Town of Decatur to the City of Atlanta and vice versa from the City of Atlanta to all points within the Town of Decatur from all passengers who took passage on said North Decatur line, and that said companies have also given during said period transfers, when requested, upon the payment of five cents fare, to any passenger from any point within the Town of Decatur to any point in the City of Atlanta, and that any passenger riding upon the line of said railway in the City of Atlanta and obtaining a transfer has been carried in said period over said North Decatur line to any point in the Town

of Decatur; that the foregoing has been the universal practice and custom of the defendants since April 1st, 1903. That at the time said contract of April 1st, 1903, which is attached to plaintiff's petition as Exhibit "B", was entered into, the Georgia Railway & Electric Company was charging only five cents on all of its lines in the City of Atlanta, and from the City of Atlanta to the Town of Decatur, including what was then and now is known as the South Decatur line, and vice versa from the Town of Decatur to the City of Atlanta. That the facts above stated as to the five cent fare charged on all lines of the Georgia Railway & Electric Company and as to transfers continued to exist, and did exist on August 23, 1907.

That the loop of the present main or North Decatur line, as referred to in the contract of April 1, 1903, begins at the intersection of McDonough and Howard Avenue or Street, formerly known as North Railroad Avenue, in the Town of Decatur, and continues as described in said contract of April 1, 1903, until it returns to

43 the same point at the intersection of said Howard Avenue and McDonough Street. That the point referred to in paragraph 34 of defendants' cross bill as the terminus of said main or North Decatur line at the intersection of McDonough Street and Sycamore Street is on said loop, and is not a terminus at all; that, as a matter of fact, there is no intersection of Sycamore and McDonough Street, but McDonough Street intersects with what is known as South Court Square, which is a continuation of Sycamore Street.

#### D.

L. J. STEELE, being sworn for plaintiff testified as follows:

The Town of Decatur has greatly increased in population since the year 1903, its population now being approximately five times what it was then. The territory all along said North Decatur line has become thickly populated since the year 1903. Many people since the year 1903 have built houses and acquired property all along the said North Decatur line, both within the Town of Decatur and outside of it since the year 1903.

The line known as the South Decatur line is considerably longer from Atlanta to Decatur than the North Decatur line from Atlanta to Decatur, and the territory along said South Decatur line from Atlanta to Decatur is sparsely settled as compared with said North Decatur line.

I have lived in the Town of Decatur for 21 years, have been connected with the Town of Decatur officially as attorney and clerk for about eighteen years, have been Mayor of Decatur for five years. The Town of Decatur has not, to my knowledge, ever made application to the Railroad Commission of Georgia for regulation of service or increase of service over the lines of defendant companies to the Town of Decatur, has never invoked the jurisdiction of the Railroad Commission for that purpose; I know the above statement to be true

44 during the last five years when I have been Mayor of Decatur, being the Mayor of Decatur, up until December 1920.

## E.

It was admitted in evidence without dispute that the Georgia Railway & Power Company, held, occupied, and operates the lines of railway and the Main or North Decatur line as lessee under a lease from the Georgia Railway & Electric Company for a term of 999 years, the lease being dated in the year 1912.

## F.

Introduced in evidence the petition of plaintiff and the amendment to said petition, the same being sworn to by L. J. Steele; said L. J. Steele on oath testifying that the facts set out in plaintiff's petition and in the amendment thereto were true.

## G.

Defendants admitted that the ordinance of March 3rd 1903 of the Town of Decatur, as set forth in Exhibit B of plaintiff's petition, was regularly enacted by the Mayor and Council of the Town of Decatur and that said ordinance was accepted by the Georgia Railway & Electric Company by and through its Board of Directors according to the resolution of said Board of Directors as set forth in Exhibit B of plaintiff's petition, and that the writing dated April 1st 1903 between the Town of Decatur and the Georgia Railway & Electric Company as set forth in Exhibit B of plaintiff's petition was executed and delivered by the parties thereto, the Town of Decatur and Georgia Ry. & Elec. Co. as set forth in said writing in said Exhibit B of said petition.

At the conclusion of the introduction of the evidence by the plaintiff his Honor Judge John B. Hutcheson directed the jury trying said case to find a verdict in favor of the Town of Decatur and under the direction of said court and following the same the jury on the 15th day of December 1921 found a verdict as follows:

45      "We the jury find the issues in this case in favor of plaintiff, Town of Decatur, and against the defendants, Georgia Railway & Power Company and Georgia Railway & Electric Company with costs against defendants. This 15th day of December 1921.

J. H. JOHNSTON,  
*Foreman.*"

On the 16th day of December 1921, his Honor, Judge John B. Hutcheson, entered a final decree upon said verdict and judgment, said decree being as follows:

"The jury in the above stated case having found the issues in favor of the plaintiff, whereupon it is considered, ordered, adjudged and decreed by the Court that the injunction is granted as prayed for in the petition of the plaintiff and the amendment thereto, and

said injunction is made permanent, and it is further ordered and decreed that the defendants, Georgia Railway & Power Company and Georgia Railway & Electric Company, their officers, agents, employees and servants, be and they are hereby permanently restrained and enjoined in all respects and particulars as prayed for by plaintiff, Town of Decatur in its petition and in the amendment to said petition, and all the relief prayed for in said petition and the amendment thereto is hereby granted; and it is further ordered and decreed that the plaintiff do have and recover of and from the defendants the sum of \$— costs, for use of the officers of the Court. In Open Court, this December 16th, 1921.

JOHN B. HUTCHESON,

*Judge Superior Court of the Stone Mountain Circuit.*

The Georgia Railway & Power Company and the Georgia Railway & Electric Company and the intervenors herein named, individually and collectively, then excepted and now except to the same and then alleged and now allege that said verdict and said decree was contrary to law and the evidence in said case and that under 46 the law and under the evidence the court erred in directing said verdict and the jury erred in finding the same and that the Court erred in entering said decree upon said verdict, and plaintiffs in error then assigned and now assign the same as error.

Be it further remembered that during the trial of said case before the jury, and before the Court had charged the jury or directed the jury to find a verdict in favor of the Town of Decatur, plaintiffs in error requested the Court in writing to charge the jury, as follows:

*"First Request to Charge.*

I charge you that in rendering a verdict you could not and should not include the territory added to the Town of Decatur by the Acts of the Legislature passed subsequent to the making of the contract.

*Second Request to Charge.*

I charge you that you should exclude from your verdict and from the operation of the contract sued upon the territory added to the Town of Decatur subsequent to the making of the contract.

*Third Request to Charge.*

I charge you that the five cents fare provision contained in the contract sued upon cannot be extended so as to include thereunder territory added to the Town of Decatur subsequent to the contract sued upon, and subsequent to the Act of the Legislature conferring upon the Railroad Commission jurisdiction over street railways."

The above written requests were made as separate specific requests. The Court failed and refused to give in charge to the jury any

one of said written requests, and said requests were refused in the instruction of the court to the jury to find the verdict rendered in said case.

Plaintiffs in error then excepted and now except to the refusal of the Court to give each of said written requests to charge and then alleged and now allege that the Court committed error in 47 not giving each of said requests. Said requests contained a correct statement of the law adapted to the issues in said case.

Plaintiffs in error then assigned and now assign the refusal to give the same as error.

In addition to the exceptions and assignments of error heretofore stated the Georgia Railway & Electric Company and the Georgia Railway & Power Company and each of the intervenors herein named, the plaintiffs in error herein, individually and collectively, further excepted to the order of the Court sustaining the general demurrers to the answers and cross bills and the amendments thereto filed by the Georgia Railway & Electric Company and the Georgia Railway & Power Company, and the sustaining of the general demurrers to the intervention and cross bill of the intervenors and further excepted to the verdict rendered by the jury as directed by the Court and the decree entered thereon, and now except to each of the said judgments sustaining the general demurrers of the Town of Decatur, to the verdict of the jury and to the decree entered thereon, exception being made separately and collectively to the said judgments on the demurrer, to the said verdict and the said decree and then assigned and now assign the same as error.

(a) Because, according to the contention of plaintiffs in error, the facts set out in the answer and cross bill as amended and the intervention and cross bill there was no valid, legal or binding contract between the Town of Decatur and the Georgia Railway & Electric Company and the Georgia Railway & Power Company, fixing a fare of 5 cents on the Main or North Decatur line.

(b) Because, under the facts set out in the answer and cross bill, as amended, and the intervention and the evidence introduced in said case, according to the contention of plaintiffs in error, there was no valid legal contract between the Town of Decatur and the Georgia Railway & Power Company and the Georgia Railway & Electric Company fixing a fare of 5 cents on the Main or North Decatur line.

(c) Because neither the Town of Decatur nor the Georgia Railway & Power Company or the Georgia Railway & Electric Company had any right, power or authority to make any binding contract as to fares. Under the Constitution of this State as set out in Code Sections 6389, 6462, 6464 and 6467 of the Code of 1910 said parties cannot make any rate agreement for fixed irrevocable fares, especially if such fares are or should become confiscatory in violation of the 14th Amendment of the Constitution of the United States, as plain-

tiffs in error contend, was set out and shown by the facts alleged in the answer and cross-bill as amended.

(d) Because, (1) The Town of Decatur had no statutory or constitutional power or authority to enter into rate contracts; (2) The said Town of Decatur had no power or authority to make contract as to fares or transportation to or from any point on a line without its territorial limits.

(e) Construing the Acts of the State of Georgia (Acts 1907 page 73 et seq.) (which according to the contention of plaintiffs in error, was necessarily done by the Court in sustaining the general demurrs and directing the verdict, and entering the decree), to hold that said act excepts from the Georgia Railroad commission, jurisdiction over rate contracts previously made by a municipality, not for itself, but for individuals; also excepts from the commission's jurisdiction territory and parts of lines added to municipal corporations having contracts with reference to fares, though the municipal

limits taking in such territory or parts of lines is subsequent  
49 to the said acts of 1907, but confers jurisdiction on said commission to change rate contracts previously or subsequently made with individuals, and also subsequently made rate contracts by a municipality renders said act unconstitutional violating the 14th Amendment of the Constitution of the United States; in that it denies plaintiffs in error, individually and collectively, the equal protection of the law making unjust and illegal discrimination in that it places under the commission's jurisdiction some contracts and not others though falling within the same class and relating to the same service placing under the commission's jurisdiction some contracts and withholding others having no legal or different classification.

(f) Construing the judgments on the demurrs, verdict and decree of the court (which according to the contention of the plaintiffs in error was necessarily done by the Court) to hold that the so called contract sued on and the Acts of the General Assembly (Georgia Acts 1914, page 703, 1916 page 618, extended the alleged contract for 5 cents fare to the added territory of the Town of Decatur, then said Acts violate Article I Section 10 of the Constitution of the United States; (1) In that said acts impair the obligations of contracts between the County of De Kalb and the Georgia Railway & Power Company and the Georgia Railway & Electric Company, giving said companies the right to lay and operate lines of railways in certain roads; and also impairs contracts between private parties and the Georgia Railway & Power Company and the Georgia Railway & Electric Company conveying private rights of way formerly outside of the city limits and now within the added municipal territory of Decatur for under said franchises and said contracts and over parts of the lines built thereunder, the street Railway Companies were not limited to a five cents fare in hauling passengers to

50 and from said parts of the lines. (2) Said acts further impair the obligations of contracts in contravention of Article I Section 10 of the Constitution of the United States in that they impair the so called contract sued on, adding additional burdens by extending it to additional territory not contemplated by the contract and not included in the territory at the time the so called contract was entered into between the parties.

(g) Construing, the judgments on the demurrs, the verdict and decree of the court (which according to the contention of plaintiffs in error, was necessarily done) to hold; that the so called contract sued on fixed a 5 cents fare for all transportation service to and from Decatur and Atlanta; while the Acts of 1907 page 73 et seq. conferred power and authority on the Georgia Railroad Commission to fix the quality and quantity of service to be performed on the parts of lines covered by said 5 cents fare provision; and that the said Commission had the right to increase said service; then said contract and said acts unconstitutionally violate the 14th Amendment of the Constitution of the United States in that they deny plaintiffs in error, individually and collectively the equal protection of the law and confiscate their property without due process of law; for as alleged and set out in the original and amended answer and cross bill and the intervention the service required by the commission makes the 5 cents fare not only non-compensatory but confiscatory; to increase the quantity and quality of service increases the costs of service and the said act of the Legislature and order of the Commission thereunder (1) renders the contract unconstitutional; or (2) the contract renders the said acts and orders unconstitutional—the one or the other or both confiscates private property by adding additional costs for service far in excess of the amount paid therefor in violation of said 14th Amendment of the Constitution of the United States.

51 (h) Construing the judgments on the demurrs, the verdict as directed and the decree thereon (which according to the contention of plaintiffs in error, was necessarily done by the Court) to hold that the Acts of 1907 page 73 et seq. conferred upon the Railroad Commission of the State of Georgia, the right, power and authority to increase the quality and quantity of service to be performed on the Main or North Decatur line and the part of the line covered by the 5 cents fare provision of the so called contract and also to keep in effect said 5 cents fare provision and uphold the orders of the commission increasing the quality and quantity of service; then the said Acts of 1907, and the orders thereunder are unconstitutional and violate Article I Section 10 of the Constitution of the United States in that it impairs the obligations of the contract sued on in keeping fixed the 5 cents fare, but increases the quantity and quality of service otherwise than provided in the contract.

(i) To compel the plaintiffs in error to operate its line in the Town of Decatur (as according to the contention of plaintiffs in error, was necessarily done by the judgments on the demurrs, the

verdict and decree) and continue the confiscatory rate of 5 cents then the said contract fare provision violates the 14th Amendment of the Constitution of the United States as set out in the original and amended answer and cross bill and the intervention.

(j) To deny plaintiffs in error, Georgia Railway & Power Company and Georgia Railway & Electric Company, the right to terminate its franchise contract with the Town of Decatur and to abrogate and surrender its entire rights to maintain and operate the line in question within the limits of the Town of Decatur, and to deny them the right to cease to operate said part of said line when the claimed contract fare of 5 cents is confiscatory and has been held confiscatory by the Railroad Commission of the State of Georgia (as contended for by the Georgia Railway & Power Company and the Georgia Rail-

52 way & Electric Company in their original and amended answer and cross bill); (1) renders the entire franchise contract sued on as thus construed violative of the 14th Amendment of the Constitution of the United States for it denies plaintiffs in error the equal protection of the law and the due process of law; and compels plaintiffs in error, Georgia Railway & Electric Company and Georgia Railway & Power Company to perpetually devote their said property to a public use without just and adequate compensation. (2) To compel intervening plaintiffs in error, to make up any part of said confiscatory rates, denies them the equal protection of the law and compels them to devote a part of their property to a public use in contravention of the 14th Amendment of the Constitution of the United States in that their property is taken to make up deficiency in the revenue of a public service corporation for which they are in no way responsible, and without regard to the value of the service rendered them by such utility.

(k) Because, according to the contention of plaintiffs in error, the judgments on the demurrers, the verdict and the decree and the enforcement of the claimed contract violates each and all of the provisions of the Constitution of this State and the Constitution of the United States as set out in the answers and cross bills filed by the Georgia Railway & Electric Company and the Georgia Railway & Power Company and the amendments thereto and the intervention and cross bill filed by the intervenors.

(l) Because the grant of 6 cents fares and 7 cents fares by the Railroad Commission of Georgia upon all the other lines of the Georgia Railway & Electric Company and the Georgia Railway & Power Company, according to the contention of plaintiffs in error, made any contract theretofore existing, between the Town of Decatur and the Georgia Railway & Electric Company and the Georgia Railway & Power Company, discriminatory; and therefore 53 said 5 cents fare provision set out in the petition is illegal and void and unconstitutional, and violates all the State and Federal Constitutional provisions as pleaded by plaintiffs in error in their original and amended answer and cross bill and the intervention, in that it discriminates against all the other patrons of the

lines of the Georgia Railway & Power Company, and especially because it discriminates against the intervenors herein mentioned, and against the localities and municipalities in which said intervenors reside.

(m) Because according to the contention of plaintiffs in error, under the facts set out in the original and amended answers and cross bills, the fare of 5 cents claimed by the so called contract sued on is confiscatory, being not more than one-third of the real cost of service, and as a result, the deficiency in said price must be borne by the Georgia Railway & Power Company and the Georgia Railway & Electric Company, or part of it fall upon the other intervenors herein named, and to the extent that the claimed five cent fare lacks paying a fair and just return for the service rendered, the Georgia Railway & Power Company is hereby deprived of its property and the opportunity to fully comply with its duties and obligations by reason of its charter to the balance of its patrons, as a quasi public service corporation.

(n) Because the judgments on the demurrers, the verdict and the decree and the carrying out of said claimed contract and permitting the said Georgia Railway & Power Company to charge only a five cent fare, according to the contention of plaintiffs in error, will be the forcing of the said Georgia Railway & Power Company and the Georgia Railway & Electric Company to carry out a provision which is discriminatory and unconstitutional, and it would be the carrying out on the part of said companies of an illegal and unconstitutional contract, and the performance of an illegal act, prohibited by the Constitution, civil and criminal laws of this State and the constitution of the United States as set out in the original and amended answers and cross bills and the intervention.

(o) Because, according to the contention of plaintiffs in error, under the facts set out in the petition, and the facts alleged in the answers and cross bills as amended and the intervention, it is shown that the limits of the Town of Decatur were extended after the year 1907, and no claimed contract of the Town of Decatur could be made to apply to territory taken into the Town of Decatur after the Acts of 1907, giving to the Railroad Commission of the State of Georgia the right to fix fares; and to perpetually enjoin the Georgia Railway & Power Company from collecting a 7 cents fare from all passengers boarding or leaving a car of the street railway company on the Main or North Decatur line outside of the territorial limits of the Town of Decatur, as they existed during and prior to the year 1907, is contrary to law and the evidence. (1) Because, the enforcement of the claimed contract with reference to territory added to the Town of Decatur after the year 1907 would be granting the Town of Decatur the right to regulate fares over portions of a line which had been by the General Assembly of the State of Georgia put under the control and jurisdiction of the Railroad Commission of this State; and because the mere extending of the limits of the Town of Decatur does

not bring into the contract added territory or repeal the jurisdiction of the Railroad Commission which had already attached, and the Railroad Commission has fixed a fare of 7 cents over all the lines of the Georgia Railway & Power Company over which the commission had jurisdiction including the extended territory.

(p) Because the Georgia Railway & Power Company and the Georgia Railway & Electric Company should have been granted its injunction upon each and every one of the grounds set out in 55 its cross bill and in its amended cross bill.

(q) Because each of the intervenors herein named should have been granted the injunction prayed for in their cross bill upon each and every one of the grounds therein set out.

(r) Because the Georgia Railway & Power Company and the Georgia Railway & Electric Company are perpetually enjoined from putting into effect the 7 cents fare though such fare was fixed and authorized by the Railroad Commission of the State of Georgia on all parts of the North Decatur line not covered by a valid subsisting contract between the parties; and are perpetually enjoined from charging a 7 cents fare from all points within the present limits of the Town of Decatur to all points without—and from all points without to all points within the present limits of the Town of Decatur; (1) though said so called contract, as contended by plaintiffs in error, did not make a contract between the Town of Decatur and the said companies fixing a 5 cents fare from all points within the Town of Decatur to all points without, and from all points without to all points within the Town of Decatur. (2) According to the contention of plaintiffs in error, the so called claimed contract is only with reference to fare from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur or from the terminus of the line in the Town of Decatur to the terminus of the same in the City of Atlanta. (3) That no contract as to fares was ever entered into referring to points on said line except from the terminus of said line in the Town of Decatur to the terminus of said line in the City of Atlanta or from the terminus of said line in the City of Atlanta to the terminus of same in the Town of Decatur.

58 (s) Because, construing the proviso of the Acts of 1907 page 73 et seq., as valid, as was necessarily done by the said judgments, verdict and decree, the whole Act of 1907 becomes unconstitutional as fixing a discriminatory and illegal scheme of rates thus violating Sections 6463, 6464 and 6467 of the Code of 1910 of Georgia, also in violation of the 14th Amendment of the Constitution of the United States in that it denies plaintiffs in error and each of them, equal protection of the law therein guaranteed, in that the effect of this Act in this case is to charge all patrons boarding or alighting from the cars of said North or Main Decatur line within the limits of Decatur only a 5 cents fare, while all other patrons for a like or less service are charged 7 cents.

(t) Because, the proviso of the Act of 1907 page 73 et seq. necessarily declared to be valid by said judgments, verdict and decree, is illegal and unconstitutional as fixing a discriminatory and illegal scheme of rates thus violating Sections 6463, 6464 and 6467 of the Code of 1910 of Georgia, also in violation of the 14th Amendment of the Constitution of the United States in that it denies plaintiffs in error and each of them, equal protection of the law therein guaranteed, in that the effect of this act in this case is to charge patrons boarding or alighting from the cars of said North or Main Decatur line within the limits of Decatur only a 5 cents fare while all other patrons for a like or less service are charged 7 cents.

(u) Because the injunction in this case was sought solely upon the ground that the street railroads were violating their contract with the Town of Decatur; and if, as contended by the plaintiffs in error, that contract was either void or terminated, then there ought to be no injunction, although the street railroads did not have authority to initiate rates; and it is contended by the plaintiffs in error, first, that the claimed contract was void originally; and, second, if not 57 void originally, it had been terminated.

(v) Because a seven cent fare was, by the Railroad Commission, fixed upon all the lines of the street railroads except such lines or parts of lines as were affected by a valid subsisting contract; and if the contract herein referred to was void originally or has terminated, as claimed by plaintiffs in error, then the rate of seven cents fixed by the Commission would be the rate for all the lines of the street railroads, including that part of the lines of the street railroads designated as the North Decatur line; and it would therefore be error for the court to enjoin the collection of the seven cents fare upon the whole or any part of that line.

(w) Because if there was in existence a valid subsisting contract between the Town of Decatur and the street railroads, the intervenors herein were not parties to such contract and therefore bound by none of its provisions, and the charge of seven cents against said intervenors, while patrons boarding or alighting from cars on the North Decatur line within the limits of Decatur were charged only five cents, was a gross discrimination against the intervenors and had the effect of denying to the intervenors the equal protection of the laws as guaranteed by the Constitution of the State of Georgia and by the Constitution of the United States, as set up in the original and amended answers and cross bills herein.

(x) Because if the contract was originally a binding contract between the parties, it was a contract at will and has, before the bringing of the suit, been terminated by reasonable and timely notice on the part of the street railroads, and if such contract was terminated, as contended by the plaintiffs in error, then there was, at the filing 58 of this suit, no contract in existence between the Town of Decatur and the street railroads and, under the order of the Commission, a seven cents fare was the legal and just fares to be charged upon the whole of the North Decatur line.

(y) Because, if the Town of Decatur had the right to make a contract with the street railroads, that right was limited to making a contract for a fixed date or time not too long extended, and the effort to make a perpetual contract, as it here endeavored to do, makes said contract void; and if said contract is void, as is contended by the plaintiffs in error, then at the date of the bringing of this suit there was no contract between the Town of Decatur and the street railroads, and such claimed contract could not therefore be the basis of the injunction granted in this case, and the seven cents fare fixed by the Commission would extend to and from within the limits of the Town of Decatur, as well as over all other portions of said Main or North Decatur line.

This bill of exceptions contains all the evidence necessary to a clear understanding of the errors complained of. Defendant in error herein is the Town of Decatur; the Georgia Railway & Electric Company and the Georgia Railway & Power Company and the individual intervenors herein and heretofore named are made parties plaintiffs in error.

The parties plaintiffs in error herein designate and specify as material to a clear understanding of the errors complained of, the following parts of the record, to wit:

- (1) The original petition of the Town of Decatur; together with date of filing and the exhibits attached thereto.
- (2) The amendment to the original petition of the Town of Decatur with the order thereon and the exhibits attached thereto.
- (3) The demurrers of the Town of Decatur to the answer and cross bill of the Georgia Railway & Power Company and the Georgia Railway & Electric Company, together with the orders and judgments thereon.
- (4) The renewed demurrers of the Town of Decatur to the amended answers and cross bills of the Georgia Railway & Power Company and the Georgia Railway & Electric Company, together with the judgments and orders thereon.
- (5) The demurrers of the Town of Decatur to the answer and cross bill of the individual intervenors, together with the judgments and orders thereon.
- (6) The answer and cross bill of the Georgia Railway & Power Company and the Georgia Railway & Electric Company.
- (7) The amendment to the answer and cross bill of the Georgia Railway & Electric Company and the Georgia Railway & Power Company filed the 7th day of November 1921 and the amendment of said parties to the answer and cross bill filed December 10th, 1921, together with all orders and acknowledgments thereon.
- (8) The answer and cross bill of the individual intervenors, together with the order of the court thereon permitting them to be

made parties defendant, and permitting the filing of their answer and cross bill.

(9) The verdict of the jury and the judgment and decree of the court entered thereon.

And now come, within the time allowed by law the Georgia Railway & Power Company, the Georgia Railway & Electric Company, and the individual intervenors named herein, to wit: R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, M. E. Hawn, David Hawn, C. McDonald, Jr. and J. C. Gorman, and present this their bill of exceptions and pray that the same may be certified as true,

and that the Clerk of the Superior Court of De Kalb County  
60 be directed to make copies of the parts of the record specified,  
in order that the errors complained of may be considered and  
corrected.

J. PRINCE WEBSTER,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
COLQUITT & CONYERS,

*Attorneys for Plaintiffs in Error  
Georgia Railway & Power Com-  
pany, Georgia Railway & Elec-  
tric Company, and the Inter-  
venors Just Above Named.*

#### *Certificate.*

I do certify that the foregoing bill of exceptions is true, and contains all the evidence, and specifies all of the record material to a clear understanding of the errors complained of; and the Clerk of the Superior Court of De Kalb County is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the present term of the Supreme Court of Georgia that the errors complained of may be considered and corrected.

This December 26 1921.

JOHN B. HUTCHESON,  
*J. S. C. De Kalb County, Stone Mountain Circuit.*

#### *Acknowledgment of Service.*

We hereby acknowledge due and legal service of the within bill of exceptions; copy received; all other and further service waived.

This December 26, 1921.

HARWELL, FAIRMAN & BARRETT,  
FRANK HARWELL,  
J. HOWELL GREEN,  
*Attorneys for the Town of Decatur.*

Clerk's Office, Superior Court of De Kalb County.

Decatur, Ga., January 3, 1922.

I hereby certify that the foregoing is the true original bill of exceptions, filed in this office, in the case therein stated; and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said court hereto affixed, the day and year last above written.

[SEAL.]

B. F. BURGESS,  
*Clerk.*

Filed in office Jan. 4, 1922.

W. E. TALLEY,  
*D. C. S. C. Ga.*

Filed in my office, this the 27th day of December, 1921.

B. F. BURGESS,  
*Clerk De Kalb Superior Court.*

62      STATE OF GEORGIA,  
*De Kalb County:*

To the Superior Court of said County:

The petition of the Town of Decatur shows to the court the following facts, to wit:

1. That petitioner is a municipal corporation under the laws of Georgia, located in said county of De Kalb.
2. That the Georgia Railway & Power Company and the Georgia Railway & Electric Company are domestic corporations under the laws of Georgia with power under their charters to operate, construct, own and maintain street railways and electric plants for the generation and transmission of heat, power and light.
3. That under the charter of said Georgia Railway & Power Company, it now operates and maintains, and has for years past, operated and maintained a system of street railways occupying various streets and rights-of-way in the city of Atlanta, in the county of Fulton, and in the towns of Decatur, Edgewood and Kirkwood, in the county of De Kalb, said Georgia Railway & Power Company operating said street railways as the lessee of the Georgia Railway & Electric Company, and also lines for the transmission of electric current located in De Kalb county and extending through other counties of this State.

4. Petitioner alleges that said Georgia Railway & Power Company has acquired a residence in said county of De Kalb by reason of the fact that it is operating a system of street railways extending from

the county of Fulton into the county of De Kalb and along the public highways between the city of Atlanta in the county of Fulton and the town of Decatur in the county of De Kalb, and in and upon the said streets of the town of Decatur; and also a system of lines for the transmission of electric current located in said county of De Kalb and extending into other counties in Georgia; also by 63 reason of the fact that it has an office and an agent in said town of Decatur in said county of De Kalb. The Georgia Railway & Electric Company has no agent or office in the county of De Kalb, but its principal office is in said county of Fulton.

5. Petitioner shows that during the month of December, 1902, and prior thereto, the Georgia Railway & Electric Company owned and operated by electricity three street car lines between the city of Atlanta in the county of Fulton and the town of Decatur in the county of De Kalb, one of said street car lines extending from near the center of said city of Atlanta to the town of Decatur on the south side of the Georgia Railroad, which runs between said city of Atlanta and said town of Decatur and two of said street car lines running from near the center of Atlanta to the town of Decatur on the north side of said Georgia Railroad.

6. That sometime prior to December, 1902, said lines were under different ownerships, but finally all three of said lines were acquired by the Georgia Railway & Electric Company.

7. That the most northerly line of said three lines of street railways running from Decatur to Atlanta, then known as the Atlanta Railway Company line, entered the town of Decatur on the western side thereof at what is known as Swanton's Hill, and ran thence in a northeasterly direction until it reached what was then known as Electric Avenue and ran thence along said Electric Avenue in a northerly direction to Atlanta Street, thence along Atlanta Street in an easterly direction to South Court Square, which is a continuation of Atlanta Street, thence along said South Court Square to McDonough Street, thence along McDonough Street to what was then known as Depot or Herring Street, now Trinity Avenue, thence in a southeasterly direction along Trinity Avenue to what was 64 then North Railroad Avenue, now Howard Street, thence east along said Howard Street to what was then the eastern limit of said town and continued east a short distance beyond said town limit, thence it turned north and ran north about the distance of two blocks, thence turned west and ran west until it again entered said town on its eastern limit where said eastern — then crossed what was then known as road Street, now known as Ponce de Leon Avenue, thence it continued west along said Ponce de Leon Avenue in said town to North Court Square, which is a continuation of said Ponce de Leon Avenue, thence it continued west along said North Court Square to West Court Square, thence along West Court Square to South Court Square, where said line connected again with the same line described as entering said town and approaching said Court Square on Atlanta Avenue, forming a loop.

8. Said last described line, has in December, 1902, been operated for a number of years between the city of Atlanta and the town of Decatur, and upon and over the above described streets in said town of Decatur and served a large number of persons living along the line of said street railway in the town of Decatur from South Court Square in a westerly and southwesterly direction to the corporate limits of said town. Said line traversed a section of said town through which no other street car line ran or now runs, and there were then and now are many residences along the line of said street railway between South Court Square and the western limits of said town at the point where said line intersects said limit of the town of Decatur, which were served by said line and by no other line convenient to them.

9. Petitioner shows further that on or about the 29th day of December, 1902, said Georgia Railway & Electric Company, without notice to the town of Decatur, commenced to tear up said last described line of street railway within the corporate limits of said town of Decatur with a view to abandoning the operation of the same.

10. Petitioner further shows that on that date, to wit, December 29, 1902, it tendered to the judge of the superior court of Fulton county, its equitable petition setting forth the fact, among other facts, that said Georgia Railway & Electric Company was tearing up said line of railway with a view to abandoning the operation of the same, and praying that said Georgia Railway & Electric Company be restrained and enjoined from tearing up said tracks and abandoning the operation of said car line, and on said date, procured a temporary restraining order from the judge of the superior court of said county of Fulton and filed said equitable petition in said court together with the restraining order thereon, which petition with the process thereto attached, and the restraining order thereon, was served upon the Georgia Railway & Electric Company on the said 29th day of December, 1902, a copy of said petition together with said restraining order, with process attached to said petition and the return of service by the deputy sheriff of Fulton county being hereto attached marked Exhibit "A" and made a part of this petition.

11. Petitioner shows further that soon after the filing of said petition in the superior court of Fulton county and the granting of a restraining order thereon, the officers of said Georgia Railway & Electric Company sought with your petitioner an adjustment of said suit without further litigation, and urged your petitioner that said Georgia Railway & Electric Company be permitted to tear up the line of railway last above described in the town of Decatur and abandon the operation of the same, urging as a reason therefor that said Georgia Railway & Electric Company, if allowed by the Mayor and Council of said Town of Decatur to tear up and discontinue the operation of said line of railway, which was then known as the Atlanta Railway Company line, though at that

time owned by said Georgia Railway & Electric Company, said Georgia Railway & Electric Company could and would give to the citizens of the said town of Decatur better street car facilities upon another parallel line of street railway between the city of Atlanta and the town of Decatur, owned by said Georgia Railway & Electric Company and formerly known as the Atlanta Rapid Transit line, the same being the line of street railway running from Atlanta to Decatur along the Georgia Railroad and immediately north thereof. That after several appearances of said company before the Mayor and Council of the town of Decatur, through its president and manager, and protracted negotiations between said railway company and said Town of Decatur, through its Mayor and Council, said town finally consented for the said Georgia Railway & Electric Company to take up said line of street railway in the town of Decatur above described in detail upon certain conditions fully described and set forth in an ordinance passed by said town of Decatur, one of which conditions was that said Georgia Railway & Electric Company should never charge more than five cents for one fare upon its main Decatur line, above referred to as the Rapid Transit Line, for one passenger and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur, or from the terminus of said line in the town of Decatur to the terminus of the same in the city of Atlanta, and that the trip either way should include the entire loop in the town of Decatur, above described though a greater fare might be charged when passengers were transported between the hours of 12 o'clock midnight and 5 o'clock a. m., and that said Georgia Railway &

Electric Company should grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the town of Decatur upon said Rapid Transit Line to any point within the city of Atlanta on any of its lines in said city, and vice versa, which should not result, however, in carrying the passenger on a parallel line or in the same general direction from which he came, provided such transfer was requested at the time of the payment of the fare and provided that the passenger should abide by such reasonable rules and regulations as the company might make; that said ordinance provided that the same should be accepted and agreed to by the said Georgia Railway & Electric Company, and that the same should be binding upon said Georgia Railway & Electric Company, its successors or assigns, whether by contract or by operation of law; and that said ordinance and the provisions thereof were agreed to and accepted by said Georgia Railway & Electric Company through a resolution of its directors on or about the 31st day of March, 1903, said ordinance of the town of Decatur above referred to having been passed on or about March 3, 1903, and the contract thus entered into between the said town of Decatur and the Georgia Railway & Electric Company, through its president and manager, at their conferences with the Mayor and Council of the town of Decatur in said town, was reduced to writing and signed by said town of Decatur and said Georgia Railway & Electric Company on the first day of

April, 1903, a copy of said ordinance of the town of Decatur and of said resolution of the directors of the Georgia Railway & Electric Company being each attached to said instrument of writing, embodying the terms of said contract, and made a part thereof, a copy of which instrument of writing is hereto attached, marked "Exhibit B" and made a part of this petition.

12. Petitioner alleges that said contract above referred to  
68 was made in and was to be performed in said county of De Kalb.

13. Petitioner shows further that after the execution of the contract referred to in the next preceding paragraph above said suit between the town of Decatur & Georgia Railway and Electric Co. a copy of which is attached to this petition as "Exhibit A," was settled and an order was passed by the judge of the superior court of Fulton county reciting that said suit had been settled and dismissing the petition therein, a copy of which order is hereto attached, marked "Exhibit C" and made a part of this petition.

14. Petitioner shows that said contract entered into between said Georgia Railway & Electric Company, through its officers and directors on the one part, and the Town of Decatur on the other part through its Mayor and Council, has been fully executed on the part of the Town of Decatur, said Town of Decatur having permitted said Georgia Railway & Electric Company to take up and remove the tracks, poles and all other equipment connected with said line of railway above minutely described in said town of Decatur, and known as the Atlanta Railway Company line, which was being operated under an unlimited franchise granted by the town of Decatur, and having permitted the said Georgia Railway & Electric Company to abandon the operation of the above described street railway, to the detriment and inconvenience of the citizens of said town, upon the promise and obligation on the part of said Georgia Railway & Electric Company that it would perform all the conditions, terms stipulations and obligations imposed upon it and set out in said ordinance of the town of Decatur, which was accepted by the Georgia Railway & Electric Company and embodied in the contract herein attached, marked "Exhibit B"; that said Georgia Railway & Electric Company did tear up and remove the tracks, poles and

69 all equipment connected with said street railway line and abandoned the operation of the same immediately after the above mentioned contract was entered into between said Georgia Railway & Electric Company and said town of Decatur, and during all these years it and its lessee, the Georgia Railway & Power Company have been relieved of the operation of said line and the expense of maintaining the same; that said line was torn up, not only in the corporate limits of the town of Decatur, but to a point on McLendon Street at the intersection of Clifton and McLendon Streets, now within the corporate limits of the city Atlanta, but within the county of De Kalb, which point is a distance of some mile and a half or two miles from what was then the western limit of the town of Decatur.

where it intersected said abandoned street car line in said town of Decatur.

15. That said Georgia Railway & Electric Company continued to operate the said two remaining lines extending from the city of Atlanta to the town of Decatur, to wit, one line on the south side of the Georgia Railroad and one line on the north side of the Georgia Railroad until said lines were leased by the Georgia Railway & Electric Company to the Georgia Railway & Power Company, one of the defendants herein, and that since said lease, the said Georgia Railway & Power Company has continued to operate said lines, charging only five cents for one fare for passengers riding upon the line above referred to as running immediately north of the Georgia Railroad, and formerly known as the Atlanta Rapid Transit Line, between the town of Decatur and the city of Atlanta, and vice versa, and to this date, has substantially complied with the terms of said contract above referred to, during a period of more than seventeen years.

16. Petitioner shows that recently, to wit, on or about the 70 5th day of October, 1920, said Georgia Railway & Power Company, and the Georgia Railway & Electric Company, notified the Mayor and Council of the town of Decatur in writing that on and after the 20th day of October, 1920, the fare to and from Atlanta and Decatur on the main or North Decatur line operated by the Georgia Railway & Power Company would be at the rate of seven cents, and denying in said notice the validity or legality of any contract provision limiting such fare to five cents (set out in said ordinance of the town of Decatur on March 3, 1903, and embodied in an agreement reduced to writing and signed April 1, 1903, by the town of Decatur and the Georgia Railway & Electric Company); said notice further stipulates that even if the provision in reference to fare to and from Atlanta and Decatur was binding at any time is not now binding or legal, and that the same is terminated from and after above named date, a copy of which notice is hereto attached, marked "Exhibit D" and made a part of this petition.

17. Petitioner further shows that said Georgia Railway & Power Company, lessee as aforesaid, heretofore applied to the railroad commission of Georgia to be permitted to increase its fare on said main Decatur line running immediately north of the Georgia Railroad, and that permission was refused by said railroad commission of Georgia on the ground that it had no jurisdiction to fix fares upon said line in so far as the town of Decatur was concerned, on account of the contract above referred to as having been entered into between the town of Decatur and the Georgia Railway & Electric Company, reduced to writing and signed on or about the first day of April, 1903.

18. Petitioner alleges that thereafter, to wit, on or about the 23d day of August, 1918, said Georgia Railway & Power Company filed a petition in the superior court of Fulton county against the railroad commission of Georgia, seeking by mandamus

to compel said railroad commission of Georgia to take jurisdiction of the matter of regulating the fares upon said main Decatur line, above referred to, between the town of Decatur and the city of Atlanta, and to compel said railroad commission of Georgia to also assume jurisdiction to fix the fares upon various other lines operated by said Georgia Railway & Power Company in the city of Atlanta, and certain other suburban towns around the city of Atlanta, said railroad commission of Georgia having previously refused to take jurisdiction to fix said fares on the ground that it appeared that the fares in said towns were fixed by contract or ordinance, and that said railroad commission of Georgia had no jurisdiction over the same. Said petition for mandamus was very voluminous and had attached to it many lengthy exhibits, the greater part of said petition and all the exhibits thereto, relating to street railways other than the main Decatur line, above referred to, running between the city of Atlanta and the town of Decatur, immediately north of the Georgia Railroad, and it is not essential to the determination of this case that all of the said petition or that any of the exhibits be attached to this petition, but it is essential that so much of said petition filed by the Georgia Railway & Power Company, under date of August 23, 1918, as relates to the town of Decatur and the contract above referred to between said town and the Georgia Railway & Electric Company, be set out as an exhibit to this petition, in order that the court may determine the issues herein raised, and petitioner attaches as an exhibit to this paragraph, *to* much of said petition filed by the Georgia Railway & Power Company on August

23, 1918, as relates to the matters pertaining to the contract of  
72 the town of Decatur and the Georgia Railway & Electric Com-  
pany, above referred to, the same being marked "Exhibit E" and made a part of this petition.

19. The railroad commission of Georgia answered said petition, a copy of which answer is hereto attached, marked "Exhibit F" and made a part of this petition, said answer having been filed on or about September 13, 1918. Said case came to be heard before His Honor, Judge George L. Bell, of the superior court of Fulton county, and on the 2nd day of October, 1918, he passed an order denying the mandamus, a copy of which order is hereto attached, marked "Exhibit G" and made a part of this petition.

20. Your petitioner shows that in said petition for mandamus, above referred to as having been filed by the Georgia Railway & Power Company, the contract entered into between said Georgia Railway & Electric Company and the town of Decatur, and set out as an exhibit to this petition was referred to in substance by the said Georgia Railway & Power Company and the validity of said contract was attacked, said Georgia Railway & Power Company claiming in said petition that said contract was null and void, and was not operative for various reasons set forth in said petition, as will appear from the exhibit of same attached to this petition and marked "Exhibit E."

21. Petitioner shows that the judgment of His Honor, Judge George L. Bell, denying the mandamus prayed for by said Georgia Railway & Power Company, was carried by writ of error to the Supreme Court of Georgia, and that said judgment was reversed in part and sustained in part, the Supreme Court of Georgia holding that in so far as the contract above referred to, between the town of Decatur and the Georgia Railway & Electric Company was concerned, the same was valid and binding, and that as to the fares between the town of Decatur and the city of Atlanta upon the main Decatur line, above referred to, running immediately north of the Georgia Railroad, the railroad commission of Georgia had no jurisdiction to fix the same, as will fully appear from the opinion of the Supreme Court of Georgia, as reported in Volume 149 of the reports of the Supreme Court of Georgia, on page 1.

22. Petitioner further shows to the court that by reason of the facts above stated, the question of the validity of the contract entered into between the town of Decatur and the Georgia Railway & Electric Company, above set out as "Exhibit B" to this petition, has been fully determined and adjudicated in the mandamus proceedings above referred to, instituted by the Georgia Railway & Power Company against the Georgia Railroad Commission, and that all questions relating to the validity of said contract are now res adjudicata; that it has already been determined that the Georgia Railway & Power Company, which is operating the street car line involved in said contract under lease from the Georgia Railway & Electric Company is bound by the terms of said contract and must perform the same; that the notice above referred to as having been given by the Georgia Railway & Power Company, and Georgia Railway & Electric Company to the town of Decatur that it will raise fares on said main Decatur line on the 20th of October, 1920, from five cents per passenger to seven cents per passenger, is a direct threat to violate the terms of said contract, notwithstanding the fact that it has been adjudicated by the Supreme Court of Georgia as being valid and binding.

23. Petitioner shows that said Georgia Railway & Power Company is operating said main Decatur line from Atlanta to Decatur and also in and upon the streets of Decatur under the franchise granted to said Georgia Railway & Electric Company by said town of Decatur, which franchise is without limitation in time, and notwithstanding this fact, said Georgia Railway & Power Company and said Georgia Railway & Electric Company, have given notice, as above stated, to said town of Decatur, that they intend to refuse to comply longer with the terms of said contract and intend on the 20th of October, 1920, to charge seven cents fare per passenger upon said street car line instead of a five cent fare per passenger as called for in said contract; that said Georgia Railway & Power Company and said Georgia Railway & Electric Company make this threat without even offering to restore the status that existed when said contract was made in 1903, as above recited, and do not propose to restore the street car line that was torn up in said town of Decatur

by the Georgia Railway & Electric Company, under the permission given by said town of Decatur in the contract above referred to. On the contrary, said defendants propose to retain all the benefits derived from said contract by the tearing up and abandonment of said street car line in the town of Decatur, the fruits of which they have enjoyed since April, 1903, having been relieved during all these years from the operation of said abandoned line and the heavy expense connected therewith, and which benefits they propose to continue to receive, and yet threaten to violate said contract by raising the fare on the main Decatur line from five cents per passenger to seven cents per passenger.

24. Petitioner shows to the court that it brings this suit upon the contract between said town of Decatur and said Georgia Railway & Electric Company entered into during the month of March, 1903, and reduced to writing and signed on the first of April, 1903, above set out, for the purpose of preventing, restraining and enjoining the said Georgia Railway & Power Company and said Georgia Railway & Electric Company from committing a breach of said contract as they have threatened to do in their notice to your petitioner, a copy of which is above set out as an exhibit to this petition.

75 25. Petitioner alleges that the said Georgia Railway & Power Company, as the lessee of said Georgia Railway & Electric Company, as well as said Georgia Railway & Electric Company is bound by all the terms, stipulations, conditions and provisions of said contract, above referred to, between the town of Decatur, and said Georgia Railway & Electric Company.

26. Petitioner further alleges that if the threatened violation and breach of said contract referred to in the last preceding paragraph is not restrained and enjoined, it will result in a multiplicity of suits being brought by the citizens of the town of Decatur against the Georgia Railway & Power Company or the Georgia Railway & Electric Company, or both; that the citizens of said town in a mass meeting assembled since the notice, above set out as an exhibit to this petition, signed by said Georgia Railway & Power Company and said Georgia Railway & Electric Company, was served on your petitioner, have resolved to resist the payment of seven cent fare upon said main Decatur line, formerly known as the Rapid Transit Line, and have stated that each and every one of them who attended said meeting, in number of about 150 or 200, would refuse to pay said seven cent fare and be ejected from the cars of said Georgia Railway & Power Company on said main Decatur line, and that they would each and every one bring an action for damages against said Georgia Railway & Power Company in case they were ejected from the cars of said company; that should the threatened violation of said contract not be restrained and enjoined by this court and said Georgia Railway & Power Company and said Georgia Railway & Electric Company should be permitted to charge seven cent fare upon said main Decatur line on or after October 20, 1920, as they have threatened to do, an irreparable injury will be done to the citizens

of Decatur, using said line, in that fares will be collected from them constantly in riding back and forth from the town of Decatur 76 to the city of Atlanta, and vice versa, in excess of the legal rate that the defendants herein are allowed to charge upon said main Decatur line under the terms of said contract between said town and said Georgia Railway & Electric Company, above set out, and there would be no practical means of keeping the amount of said illegal payments and should each citizen so keep said amounts, a vast multitude of suits would be necessary in order to compensate the citizen- of the town of Decatur for the damages thus sustained by them, and interminable litigation would ensue, and you petitioner acting for and in behalf of said citizens of the town of Decatur is without adequate remedy at law, and it is necessary that the aid of the court of equity be invoked to prevent the gross injustice about to be done to the citizens of your petitioner, and unless the restraining power of the court of equity is granted, the public interests of the citizens of the said town of Decatur will suffer, and many controversies, much confusion, unnecessary risk, and a multiplicity of suits will follow by reason of the resistance to the enforcement of the threatened increase of fares by said defendants.

Now, wherefore, waiving discovery of each of the defendants, herein, petitioner prays that the defendants herein named, to wit, the Georgia Railway & Power Company and the Georgia Railway & Electric Company, by themselves, their officers, agents, employes and servants be temporarily restrained and enjoined from carrying into effect their threat to rescind the contract above referred to as having been made between the town of Decatur and the Georgia Railway & Electric Company, and from raising the fares on said main Decatur line, formerly known as the Rapid Transit Line, from five cents to seven cents per passenger from the town of Decatur to the city of Atlanta, and vice versa, until a hearing can be had upon this 76½ petition, and that upon said hearing, said temporary restraining order and injunction be made permanent. Petitioner further prays that a rule nisi issue calling upon the defendants to show cause why the prayers of this petition should not be granted. Petitioner prays for such other and further relief as the ends of justice and equity may require.

Petitioner further prays that process may issue requiring the said Georgia Railway & Power Company and the said Georgia Railway & Electric Company to be and appear at the next term of the superior court in and for said county of De Kalb to answer petitioner's complaint.

L. J. STEELE,  
FRANK HARWELL, &  
GREEN, TILSON & MCKINNEY,  
*Attorneys for the Town of Decatur.*

## GEORGIA,

*De Kalb County:*

Personally appeared before the undersigned officer, L. J. Steele, who says on oath that he is Mayor of the Town of Decatur, and that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

L. J. STEELE.

Subscribed and sworn to before me this the 19th day of October, 1920.

B. F. BURGESS,  
*Clerk Superior Court De Kalb Co., Ga.*

Read, considered and sanctioned; let the foregoing petition be filed, let the defendants, the Georgia Railway & Power Company and Georgia Railway & Elec. Co. show cause before me at the State Capitol in Atlanta, Georgia, at the State Library, on the 19th day of November, 1920, at 9.30 o'clock a. m. why the prayers of the foregoing petition should not be granted and in the meantime, and until

further order of the court, the defendants, the Georgia Rail-  
77 way & Power Company and Georgia Railway & Electric Com-  
pany, by themselves, their officers, their agents, their em-  
ployees, and their servants are restrained and enjoined from carrying  
into effect their declared purpose to increase the fares on the main  
Decatur line, referred to in the foregoing petition as the rapid transit  
line, between the city of Atlanta, in the county of Fulton, and the  
town of Decatur, in the county of De Kalb, running immediately  
north of the Georgia Railroad, from five cents per passenger to seven  
cents per passenger, and from otherwise altering the status upon said  
line of street railway as to the fares charged thereon. Let the fore-  
going petition and this order be served upon each other said de-  
fendants at least 20 days before the time set for the hearing of this  
rule nisi. This Oct. 19, 1920.

JOHN B. HUTCHESON,  
*Judge Superior Court, Stone Mountain Circuit.*

## GEORGIA,

*Fulton County:*

To the Superior Court of said County:

The petition of the town of Decatur shows to the court the following facts, to wit:

1st. That the Georgia Railway and Electric Company is a corporation chartered under the laws of Georgia, with its principal office and place of business in said county of Fulton.

2nd. That said Railway and Electric Company is operating a system of electric street railways in the city of Atlanta and the

territory adjacent thereto, one of which lines extends from Atlanta in said county of Fulton to said town of Decatur in the county of De Kalb, and enters said town on the west side, coming in at a point known as Swanton's Hill, and runs along Electric Avenue to Atlanta Street, thence up Atlanta Street to South Court Square, thence along McDonough Street to Depot Street, thence along Depot Street to Railroad Avenue, thence along Railroad Avenue to the eastern limits of said town, thence a short distance east of said town limits, thence north to Broad Street extended, thence along Broad Street west to the limits of said town again; thence continuing west along said Broad Street to North Court Square, thence still west along said North Court Square to West Court Square, thence south along said West Court Square to Atlanta Street, thence back out said Atlanta Street over the same track upon which it *is* enters said town.

No. 3. That the right-of-way and franchise to operate said Street Railway upon and along the streets of said town of Decatur was granted by the town council of said town to the Atlanta City Railway Co. and that said Georgia Railway and Electric Co. now own and are operating said street railway system, having received the 79 same by successive transfers and conveyances from said Atlanta City Railway Company, and those holding under them.

No. 4. That for years past the citizens of said town of Decatur have been using said street railway, and have built homes along the right-of-way of said street railway, and have made valuable improvements thereon, relying upon said street railway's being operated permanently.

No. 5. That said Georgia Railway and Electric Company have recently ceased to operate their line upon what is known as the loop in said town of Decatur, having stopped the running of all their cars thereon, which comprises the principal streets of said town upon which said line is laid, and are now actually engaged in taking down the trolley wires of said street car line, the same being electrically equipped, and are proceeding to take up the tracks of said street car lines in said town, to the irreparable injury and damage of said town and the citizens thereof.

No. 6. That said acts of said Georgia Railway and Electric Company are illegal, violative of the rights of said town and its citizens, and unless restrained and enjoined will work irreparable injury to said town and its citizens.

Wherefore, petitioner, waiving discovery, prays that said Georgia Railway and Electric Company be restrained and enjoined from further tearing down the trolley wires of said street railway, from tearing up the tracks thereof, or from in any way altering the status thereof, except to operate said system of street railway according to the requirements and necessities of the public; that until the hearing of this case, a temporary restraining order be granted, restraining said Georgia Railway & Electric Company from in any

way altering the status of said street railway system, except to operate the same according to the requirements and necessities of the public.

80 Petitioner further prays that process may issue requiring the said defendant company to be and appear at the next term of said court to answer petitioner's complaint.

GREEN & PRESTON,  
*Petitioner's Attorney.*

GEORGIA,

*De Kalb County:*

Personally appeared J. L. Johnson, who on oath says that he is a member of the town council of said town of Decatur, that the mayor of said town is absent from the State; and that the facts set forth in the foregoing petition are true.

J. L. JOHNSON.

Sworn to and subscribed before me this the 27 day of Dec. 1902.

W. M. RAGSDALE,  
*Ordinary.*

Read and considered: Let petition be filed and served. Let defendant show cause before me on January 14, 1903, at nine o'clock a. m., or as soon thereafter as a hearing can be had at the court house in Fulton county, Ga. why injunction should not be granted as prayed in this petition. In the meantime and until the hearing or further order of court to the contrary, the defendant company, by its agents, servants, officers, or employes, is restrained from tearing up or removing the wires, poles, tracks or other appliances described or referred to in the petition, or otherwise altering the physical status of the electric railway described in said petition. Dec. 27, 1902.

J. H. LUMPKIN,  
*J. S. C. A. C.*

81 STATE OF GEORGIA,  
*County of Fulton:*

TOWN OF DECATUR

v.

GEORGIA RAILWAY & ELECTRIC CO.

Complaint.

To the Sheriff, or his Deputy, of said county, Greeting:

The defendant is hereby required, personally or by attorney, to be and appear at the superior court, to be held in and for said county, on the first Monday in March, 1903, then and there to answer the plaintiff's complaint, as in default thereof said court shall proceed as to justice shall appertain.

Witness the Honorable J. H. Lumpkin, judge of said court, this 29th day of December, 1902.

A. B. HARRISON,  
*Deputy Clerk.*

Filed in office 29 day of December, 1902.

T. H. JEFFRIES,  
*Deputy Clerk.*

GEORGIA,  
*Fulton County:*

Served the defendant, Georgia Railway and Electric Company, a corporation, by serving T. K. Glenn, Vice-President, by leaving a copy of the within writ and process with him in person, at the office and place of doing business of said corporation, in Fulton county, Georgia.

This December 29, 1902.

W. C. TOLBERT,  
*Deputy Sheriff.*

"EXHIBIT B."

This agreement made this 1st day of April, 1903, by and between the Town of Decatur, a municipal corporation in the county of De Kalb, State of Georgia, acting by and through its Mayor and Council, party of the first part, and the Georgia Railway & Electric

Company, a corporation under the laws of Georgia, with its 82 principal office in the county of Fulton, party of the second part, witnesseth that,

Whereas, the mayor and council of said town of Decatur did on March 3rd, 1904, adopt an ordinance, a copy of which is hereto attached and made a part hereof;

And whereas, the terms of said ordinance were accepted by said Georgia Railway & Electric Company, at a meeting of its board of directors held on March 31st, 1903, a copy of the resolution adopted by said board of directors being hereto attached and made a part hereof.

Therefore, in accordance with the provisions of said ordinance, and in consideration of the mutual covenants and agreements herein contained, the parties hereto contract and agree with each other as follows:

1. Party of the first part hereby confers the authority, right, permission and consent on said Georgia Railway & Electric Company and contracts and agrees that said company shall be allowed and permitted to at once discontinue the operation of, abandon and remove the tracks, poles and other structures constituting the railway line, known as the line of the Atlanta Railway Company in the town of Decatur and extending along and over the route in said town of Decatur specified in said ordinance.

2. The said town of Decatur further agrees to do and perform all things provided to be done or performed on its part by the ordinance hereinbefore referred to.

3. In consideration of the benefit to said party of the second part from discontinuance, abandonment and removal of the said line of railway hereinbefore referred to, and in further consideration of the benefits to be derived by it from the performance on the part of the town of Decatur of the provisions undertaken to be performed by it under said ordinance, said party of the second part hereby contracts and agrees with the said town of Decatur that it (the said Georgia Railway & Electric Company) will, upon its part, do and perform all things specified in said ordinance to be done and performed by it, and will keep and observe the conditions and terms of the said ordinance.

4. Said Georgia Railway & Electric Company further hereby surrenders to said town of Decatur the franchise formerly belonging to the Atlanta Railway Company, in said town of Decatur, and conveys and quitclaims to the said town of Decatur all right, title or interest which the said Georgia Railway and Electric Company has or may have had in and to the said franchise owned by the Atlanta Railway Company, in the said town of Decatur.

In witness whereof, the parties hereto have hereunto set their hands and seals on the day and year hereinabove written as the date hereof; the town of Decatur acting by and through its Mayor and Clerk, and the Georgia Railway and Electric Company acting by and through its president and secretary, all hereunto authorized, executed and duplicate.

[Seal of Town of Decatur.]

TOWN OF DECATUR,  
By J. W. MAYSON,

[SEAL.]

*Mayor.*  
L. J. STEELE,  
*Clerk.*

[Seal of Georgia Railway & Electric Company.]

GEORGIA RAILWAY & ELECTRIC  
COMPANY,  
By P. S. ARKWRIGHT,

[SEAL.]

*President.*  
THOS. K. GLENN,  
*Secretary.*

Signed, sealed and delivered in *to* Town of Decatur, in De Kalb County, Georgia, in the presence of

BEN E. RAGSDALE.

W. M. RAGSDALE,  
*Ordinary.*

Signed, sealed and delivered as to the Georgia Railway & Electric Co. in the county of Fulton, State of Georgia, in presence of

L. P. PAIRO.

R. E. CULLIANE,

*Notary Public, Fulton Co., Ga.*

Be it resolved by the board of directors of the Georgia Railway and Electric Company that the ordinance adopted by the Mayor and Council of the town of Decatur, on March 3d, 1903, conferring the right and authority upon this company to discontinue the operation of, abandon, remove the tracks, poles and other structures

84 constituting the street railway line known as the Atlanta

Railway line in said town of Decatur, and covering the route described in said ordinance, be and the same is hereby accepted upon the terms set forth in said ordinance; and the terms and conditions set forth in said ordinance to be approved by this company are hereby agreed to by it in consideration of the right to remove said line conferred by said ordinance.

Be it further resolved that the president and secretary of this company are hereby authorized to sign and enter into with said town of Decatur in the name and on behalf of this company, an agreement embodying the terms of said ordinance in accordance with the requirements of said ordinance.

An ordinance granting the right to the Georgia Railway & Electric Company to remove and to discontinue the operation of the tracks and structures formerly known as the Atlanta Railway Company in the town of Decatur, Georgia, under certain conditions and restrictions in said ordinance set forth.

Whereas, the said Georgia Railway & Electric Company, which has succeeded to all the property rights and franchises of said Atlanta Railway Company, did heretofore commence to tear up the tracks and other structures formerly known as the Atlanta Railway Company in the said town of Decatur, with the intention of discontinuing the operation of said line of railway.

And whereas, said Georgia Railway & Electric Company was prevented from removing said structures, and from discontinuing the operation of said line of railway by a temporary restraining order granted by the judge of the superior court of Fulton county upon the petition of said town of Decatur, against said Georgia Railway & Electric Company, which said petition is now pending in said court, and returnable to the March term, 1903;

85 And whereas, the president, vice-president and manager of said Georgia Railway & Electric Company have appeared before the Mayor and Council of said town of Decatur on several occasions, and urgently requested that said Georgia Railway & Electric Company be allowed by said Mayor and Council to take up and discontinue the operation of said Atlanta Railway Company line, urging as a reason for such action by said Mayor and Council that, if

allowed to take up and discontinue said line known formerly as Atlanta Railway Company, said Georgia Railway & Electric Company could and would give to the citizens of said town of Decatur better street car facilities upon another parallel line of street railway between the city of Atlanta and the town of Decatur owned by said Georgia Railway & Electric Company, and formerly known as the Atlanta Rapid Transit Line, the same being the line of street railway running from Atlanta to Decatur along the Georgia Railroad and immediately north thereof;

Now, therefore, be it ordained by said Mayor and Council, and it is hereby ordained by said authority that the authority, right, permission and consent are hereby granted to said Georgia Railway and Electric Company to discontinue the operation of, abandon and remove the tracks poles and other structures constituting the street railway line referred to and known as the line of the Atlanta Railway Company in the town of Decatur, extending along and over the following route in said town of Decatur, to wit, entering said town on the western side thereof at what is known as Swanton's Hill, and running thence in a northeasterly direction until it strikes what is known as Electric Avenue; thence along said Electric Avenue in a northerly direction to Atlanta Street; thence along Atlanta Street in an easterly direction to South Court Square, which is a continuation

of Atlanta Street; thence along said South Court Square to 86 McDonough Street; thence south along McDonough Street to

Depot or Herring Street; thence in a southeasterly direction along Depot or Herring Street to North Railroad Avenue; thence east along said North Railroad Avenue to the eastern limit of said town, and continuing east a short distance beyond said town limit, thence turning north, and running north about the distance of two blocks, thence turning west, and running west until it again strikes the eastern limit of said town where said limit crosses Broad Street; and thence continuing west along said Broad Street in said town to North Court Square, which is a continuation of said Broad Street; thence continuing west along said North Court Square to West Court Square; thence along West Court Square to South Court Square, where said line connects with the same line described as entering said town, forming a loop; upon the conditions and restrictions herein-after specified.

Section 2. Be it further ordained, that in consideration of the above mentioned rights granted by said town to said Georgia Railway & Electric Company, and in consideration of the benefits that said Georgia Railway & Electric Company will derive from discontinuing and taking up the structures comprising said Atlanta Railway Company, the said authority, rights and privileges above referred to are granted and conferred only upon conditions that this ordinance shall first be accepted by said Georgia Railway & Electric Company, and that said Georgia Railway & Electric Co. its successors and assigns, whether by contract, or by operation of law, shall be bound to do the following things, to wit:

First. Upon the removal of the tracks and structures above referred to, to restore the surface of those streets from which such tracks and structures shall be removed to as good condition as the same are now in.

87 Second. To never charge more than five cents for one fare upon its main Decatur line, above referred to as the Rapid Transit line, for one passenger, and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur, or from the terminus of said line in the town of Decatur to the terminus of the same in the city of Atlanta and the trip either way shall include the entire loop in the town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of twelve o'clock midnight and five o'clock a. m.; the said Rapid Transit line above referred to having the following route, to wit: Commencing in the city of Atlanta at the intersection of Peachtree Street and Edgewood Avenue, and running thence in an easterly direction along Edgewood Avenue to Hurt Street; thence in a southerly direction along Hurt Street to Decatur Street; thence along Decatur Street, which is immediately north of the Georgia Railroad, in an easterly direction to a point where said street is intersected by the line between the counties of Fulton and De Kalb, thence continuing in the same general direction immediately north of said Georgia Railroad until it intersects the western limit of said town of Decatur where it crosses North Railroad Avenue; thence continuing in the same direction in the town of Decatur along said North Railroad Avenue to North Candler Street, thence along North Candler Street north a short distance to a continuation of said North Railroad Avenue, thence in an easterly direction along said continuation of said North Railroad Avenue to Oak Street, thence north along said Oak Street to Broad Street, thence west along said Broad Street to East Court Square; thence south along East Court Square to South Court Square,

88 thence west along said South Court Square to McDonough Street, thence south along said McDonough Street to said North Railroad Avenue, there connecting with said line a short distance from where it enters said town of Decatur, coming from Atlanta and forming a complete loop within the town of Decatur.

Third. To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the town of Decatur upon said Rapid Transit Line to any point within the city of Atlanta on any of its lines in said city, and vice versa, which does not result, however, in carrying the passenger on a parallel line, or in the same general direction from which he came, provided such transfer is requested at the time of the payment of the fare, and provided the passenger shall abide by such reasonable rules and regulations as the company may make, so as to limit the time in which such transfer is used, in order that it may be available only for the first connecting car, and in order to cover such other matters as the company may deem necessary or proper to protect the

company from imposition, abuse, or assignment of such transfer, and to avoid liability in damages from mistakes that may be made by the passengers or the employes in regard to such transfers.

Four. To gradually from time —, as it may obtain permission so to do and may have funds available for such purpose, double track said Rapid Transit Line from terminus to terminus, the loop already described in the town of Decatur being considered a double track; provided the time within which said double track shall be completed does not exceed five years, in the event it can obtain permission to construct said double track, which said double track, when completed shall be maintained in a substantial safe and expeditious manner and shall be operated with cars and rolling stock kept in a safe and comfortable condition. Permission to construct said

89 double track in the town of Decatur is hereby granted.

Be it further ordained that the terms of this ordinance shall be accepted by said Georgia Railway and Electric Company at a meeting of its board of directors, so that the same may appear upon the minutes of said board of directors, within thirty days from the passage hereof, and the terms of this ordinance shall not be effective until so accepted, and an agreement embodying the terms hereof shall have been entered into by the said town of Decatur and said Georgia Railway & Electric Company, executed by the Mayor and Clerk of said town, on the part of said town, and by the president and secretary of said company, or by such officers of said company as under its charter are authorized to execute deeds to realty, which agreement shall in addition to the above terms, reconvey to said town any rights, grants or franchises that said Georgia Railway & Electric Company may have acquired within said town of Decatur as successor to the rights, grants and franchises of the said Atlanta Railway Company acquired from said town of Decatur.

Section 3. Be it further ordained that all ordinances or parts of ordinances in conflict herewith are hereby repealed. The within case of the Town of Decatur v. Georgia Railway and Electric Company having been settled between the parties, it is ordered that said case be, and the same is hereby dismissed, at cost of defendant. This 10th day of March, 1903.

J. H. LUMPKIN,  
J. S. C. A. C.

"Exhibit C."

"EXHIBIT D."

To the Mayor and Council of the Town of Decatur and to the Town of Decatur:

90 You are hereby notified that on and after the 20th day of October, 1920, the fares to and from Atlanta and Decatur on the main or North Decatur line operated by the Georgia Railway and Power Company will be at the rate of seven (7) cents.

Denying the validity or legality of any so-called contract provision limiting such fares to five (5) cents (set out in an ordinance of the Town of Decatur and the Georgia Railway & Electric Company); you are notified that even if the provision with reference to fare, to and from Atlanta and Decatur, was binding at any time, it is not now binding or legal, and is hereby terminated from and after the above named date.

This 5th day of October, 1920.

GEORGIA RAILWAY & POWER  
COMPANY,  
By P. S. ARKWRIGHT,  
*President.*  
GEORGIA RAILWAY & ELECTRIC  
COMPANY,  
By JOHN C. HALLMAN,  
*President.*

“EXHIBIT E.”

STATE OF GEORGIA,

*County of Fulton:*

To the Superior Court of said county:

The petition of Georgia Railway & Power Company shows as follows:

1. The Georgia Railway & Power Company is a resident of the county of Fulton, incorporated under the general laws of this State incorporating street railway companies, authorized and empowered by its charter to operate, construct and maintain street railways and electric plants for the generation of heat, power and light.

2. Under said charter, the Georgia Railway and Power Company now operates and maintains, and has for years past operated 91 and maintained a system of street railways, occupying various streets and private rights-of-way in the city of Atlanta, and in the towns of Decatur, Edgewood, Kirkwood, East Point, College Park and Hapeville, and on certain public roads, highways and private rights-of-way in the counties of Fulton and De Kalb, operating said railway system as lessee of the Ga. Railway and Electric Company.

3. The railroad commission of Georgia is a body of public officials, created by the laws of Georgia, with its domicile in the county of Fulton, said State, consisting of five commissioners, to wit, C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry.

4. Prior to the act of 1907 it was within the jurisdiction of the railroad commissioners, vested exclusively in them, to determine what was just and reasonable rates and charges to be observed by all railroad companies doing business in this State, and it was further

the duty of said commissioners to make reasonable and just rates of freight and passenger tariffs to be observed by all railroad companies doing business in this State on the railroads thereof; and to make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to charges for the necessary handling and delivering of all freight; to make such just and reasonable rules and regulations as may prevent unjust discrimination in the transportation of freight and passengers on the railroads in this State; and to make just and reasonable joint rates for all connecting railroads doing business in this State, and for all traffic or business passing from one of said roads to another.

5. By an act approved August 23, 1907, enlarging the duties of said railroad commission, the powers and duties of that body were enlarged as follows:

92 "The powers and duties hereinbefore conferred by law upon the railroad commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads and street railroad corporations, companies or persons owning, leasing or operating street railroads in this State; Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company; and provided, that this section shall not operate as a repeal of any existing municipal ordinance." Section 2363.

6. After the passage of this act of 1907, subject to the provisions therein, it was within the power and it was the duty of said railroad commission to make, to be observed by the Georgia Railway and Power Company, a schedule of just and reasonable rates of charges for transportation; and from time to time to review said rates and charges, increasing or lessening the same as the occasion might demand, so that at all times the rates, fares and charges of said Georgia Railway & Power Company shall be just and reasonable, both as to the said power company and to its patrons, the public.

(Paragraphs 6 to 36 inclusive omitted as irrelevant).

37. The Georgia Railway & Electric Company is and prior to 1907 had two lines in the town of Decatur, one known as the main Decatur line, bought from the Rapid Transit Company, running north of the Georgia Railway, and the other known as the South Decatur line, running south of the Georgia Railroad. There is no pretense that there is any contract-franchise or otherwise-fixing rates as to the South Decatur line.

38. In the original consent for the initial construction of the Main Decatur line there was no rate provisions. Thereafter, the Georgia Railway & Electric Company purchased a line, then in

93 Decatur, from the Atlanta Railway & Power Company. The Georgia Railway & Electric Company in March, 1903, desired to discontinue this last line and physically removed it from the streets of Decatur. This was at first resisted by the town

but afterwards an agreement was made between the parties consenting to the removal of the line upon the following basis:

"To never charge more than five cents for one fare upon its Main Decatur line for one passenger for one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of same in the town of Decatur, and vice versa, though a greater fare may be charged when passengers are transported between the hours of twelve o'clock midnight, and five o'clock a. m."

To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the town of Decatur upon said Rapid Transit line to any point within the city of Atlanta on any of its lines in said city, and vice versa, etc."

41. Other than is above set out, there was in 1907 in existence no contract franchises or otherwise between petitioner and the towns of Edgewood, Decatur, East Point and College Park, fixing fares to be charged on petitioner's lines of railway, nor except the franchise ordinances above referred to, were there any ordinances in the towns of Edgewood, Decatur, East Point and College Park, seeking to fix the rates that could be charged by petitioner upon its lines of railway.

42. Your petitioner charges that neither of the towns of Edgewood, Decatur, East Point and College Park had charter power to make with your petitioner contract fixing street railroad fares, and any contracts sought to be made by either of said Towns with petitioner was null and void for lack of power on behalf of all said Towns to make such contract; nor did either of said towns have charter power to pass any ordinance fixing the rates of fares

94 that petitioner should charge upon its lines of railway.

Under the constitution and laws of this State, the power of fixing railroad fares, either adversely or by contract, is vested in the legislature, and such powers have not been granted to said municipalities by the general assembly.

43. On the 16th day of April, 1918, the Georgia Railway and Power Company filed its petition with the railroad commission of Georgia, alleging inter alia:

"That said rates for the service of electric current and street car fares and gas now on file with this Honorable Commission are wholly inadequate and insufficient to furnish sufficient income to properly care for and preserve its properties and adequately and efficiently serve the public."

"That the said rates are so low as to be inadequate and insufficient to pay the cost of the service and yield a reasonable return on the investment necessary to render the service."

"That it is directly and immediately in the interest of the public locally and throughout the entire territory served by it and for the national welfare that petitioner be granted an increase in its rates in order to keep it a going concern and enable it to properly and effectively serve the public. Petitioner is ready and will disclose

at the hearing all facts and give all information and details desired by the Honorable Commission.

44. To this petition, duly filed and served, there was attached a formulated table of rates for gas, electric current and street car fares which petitioner alleged was fair and reasonable and which was necessary to enable petitioner to continue in the discharge of its duties and responsibilities to the public and to preserve it as a useful public corporation. Your petitioner prayed "The 95 approval of this Honorable body of the said table of rates so formulated in order that the same may become effective."

A copy of said petition together with the attached formulated table of rates which petitioner desires to be permitted to charge is thereto attached marked "Exhibit B."

45. After said petition had been filed with the railroad commission and properly served under its rules and regulations the same was set for hearing and a painstaking and exhaustive hearing before said commission was had, extending over several weeks.

46. At and during said hearing petitioner brought before the commission oral testimony covering several hundred pages of typewritten matter and introduced into the hearing all of its records and books all of which, as petitioner contends, showed clearly that the rates and charges which the commission was asked to approve were just, fair and reasonable and necessary for the protection of the public as well as essential to the welfare of petitioner.

47. A defense was made to said petition, Exhibit B, by attorneys purporting to represent certain municipalities and manufacturing interests, including among the municipalities the cities of Atlanta and Decatur. The cities of Atlanta and Decatur alone attacked the jurisdiction of the commission to fix the sought for street railway fares.

48. These cities not only deny that the street railway fares which the commission was asked to approve were just and reasonable, but alleged the existence of certain contracts between petitioner and the cities of Atlanta, Edgewood, Decatur, East Point and College Park which brought petitioner within the proviso of the act of 1907, thereby taking from the commission the jurisdiction to fix rates in said cities and in the counties of Fulton and De Kalb.

96 49. To sustain the contention that the street railway fares and charges which the commission was asked to approve were not just and fair, defendants depended upon the testimony of Mr. Joel Hurt, dealing with what he declared to be the unfair capitalization of the Georgia Railway and Power Company, and upon the testimony, oral and written, introduced by petitioner.

50. On the question as to the jurisdiction of the commission to approve the street car fares and charges sought by petitioner upon its lines of street railway in the cities of Atlanta, Edgewood, Decatur, East Point and College Park, and on the roads and highways of the

counties of Fulton and De Kalb, defendants introduced before the commission the following testimony:

- (1) The charter of the Atlanta Street Railroad Company, dated February 23, 1866, appearing in Georgia Laws, 1865-6, page 201, copy of which is hereto attached, marked "Exhibit E."
- (2) Amended charter of the Atlanta Street Railroad Company, dated December 26, 1890, appearing in Georgia Laws for the years 1890-91, page 283, copy of which is hereto attached and marked "Exhibit F."
- (3) Charter of the Atlanta Consolidated Street Railroad, dated May 16, 1891, which is hereto attached and marked "Exhibit G."
- (4) Charter of the Georgia Railway & Electric Company, dated January 28, 1902, a copy of which is hereto attached marked "Exhibit H."
- (5) Deed from the Atlanta Street Railroad Company to the Consolidated Street Railroad Company, recorded in Book C-4 page 639, of Fulton County Records, copy of which is hereto attached, marked "Exhibit I."
- (6) Deed of Atlanta Railway & Power Company to the Georgia Railway and Electric Company, recorded in Deed Book 160, page 182, of Fulton County Records, copy of which is hereto attached marked "Exhibit J."
- (7) Resolution of the city council of Atlanta passed and adopted January 1, 1869, copy of which is hereto attached marked "Exhibit K."
- (8) Ordinances of the city of Atlanta granting the right to merge certain lines of railway in the city of Atlanta, dated December 7, 1891, copy of which is hereto attached marked "Exhibit L."
- (9) An ordinance of the city of Atlanta allowing the Atlanta Railway and Power Company and certain other to transfer property and franchises to the Georgia Railway & Electric Company, adopted January 27, 1902, copy of which has already been attached, marked "Exhibit A."
- (10) An ordinance of the city of Atlanta dated March 11, 1912, copy of which is attached, marked "Exhibit M."

51. Petitioner avers that the above sub-paragraph numbers 1 to 10 inclusive, together with the Franchise ordinances in the nature of contract and the ordinances seeking to fix the fares charged, heretofore in this petition set out, was all the evidence before the commission dealing with their jurisdiction to fix and approve the street railroad fares sought by your petitioner; and your petitioner alleges that under said evidence the commission has jurisdiction and authority to consider the petition of the Georgia Railway & Power Company and to grant the increased street railroad fares sought, provided they find, as they did, that the same are just and reasonable.

52. Petitioner shows that after hearing the evidence and argument on said petition, the railroad commission finally on the 14th day of August, 1918, passed final judgment thereon, in which various changes were made in the charged, rates and fares of petitioner

98 to gas, light and power, resulting in the main in an increase of rates, charges and fares over said rates, charges and fares in force prior to the filing of the petition above referred to but declined to grant the increase of street railway fares sought for the sole reason that under the proviso of the act of 1907 they did not have jurisdiction to fix street railroad fares in the cities of Atlanta, Edgewood, Decatur, East Point and College Park; and while the commission did not grant the prayer of petitioner as to street railroad fares because of lack of jurisdiction, as is just stated, the commission did find that as a matter of fact the street railroad fares in the cities aforesaid were too low and that in fairness and justice they ought to be increased to six cents instead of five, and that if the cities concerned would change their ordinances they would at once act and allow six cent fare instead of five cents. A copy of the official order of the commission is hereto attached marked "Exhibit N."

53. Said commissioners erred in declining to take jurisdiction in the matter of approving and fixing just and reasonable street railroad fares as prayed for by your petitioner.

(1) Because there were no contracts valid or otherwise, between the city of Atlanta and your petitioner, fixing the street railroad fares nor was there in existence in 1907, an ordinance valid or otherwise passed by the city of Atlanta fixing street railroad fares, and if there existed at said time any such contracts or ordinances, the same were invalid (a) because the city of Atlanta lacks the charter power to make any such contracts or ordinances, and (b) because if the city of Atlanta had charter power to make said contract and enact said ordinances they would be void because they violate article 4, section 2, paragraph 1, of the constitution of the State of Georgia, conferring upon the general assembly alone the power of regulating passenger tariffs, preventing unjust discrimination, and fixing reasonable and just rates.

99 (2) The claimed contracts between petitioner and the towns of Edgewood and East Point are not valid contracts because (a) the said towns lack the charter power to make such contract, and (b) because if the towns of Edgewood and East Point had charter power to make said contract they would be void because in violation of article 4, section 2, paragraph 1, of the constitution of the State of Georgia, which restricts the power of regulating passenger tariffs and preventing discrimination to the general assembly of this State and (c) because under the words of the claimed contract the fares in the two said towns are not fixed, but are to vary with the rates in the city of Atlanta, and the commissioners in fixing rates in the city of Atlanta would lawfully automatically fix rates in the two said towns.

(3) The claimed contracts in the towns of Decatur and College Park are invalid (a) because each of said towns lacks the charter power to make such contract, and (b) because if said towns claimed the charter power to make said contract it is in violation of article 4, section 2, paragraph 1, of the constitution of this State, which restricts to the general assembly the power to make rates and prevent discrimination on railroads.

(4) Even if they are valid contracts as to one or more of the municipalities upon whose streets petitioner has lines, the existence of such valid contracts would not prevent the railroad commission from exercising its jurisdiction to fix street railroad fares of petitioner in all cases other than cases covered by said valid contract. It is within the jurisdiction and the duty of the commission to fix just and reasonable street railroad fares except in cases covered by valid existing laws and ordinances passed, and enacted prior to 1907.

(5) If there in the cities whose streets are occupied by 100 petitioner, valid existing contract, the act of the commissioners in fixing and approving just and reasonable rates would not, under the laws, be an impairment of such contracts. Under the constitution of this State, article 4, section 2, paragraph 1, the general assembly alone can either by contract or laws, fix fares for street railway companies, and if cities having street railway corporations can contract with reference to fares, the above part of the constitution enters into and becomes a part of such contract, and such contracts, whether the legislature acts directly or through commissioners, are not impaired, but the provisions of such contract are, in fact, thereby carried out.

(6) The proviso in the act of 1907 is void because in violation of the constitution of the State of Georgia, set out in the Civil Code in sections 6391 and 6358, in that it does not have uniform operation throughout the State, and is not impartial and complete as required by said constitution.

54. Your petitioner shows that the refusal of the railroad commission to take jurisdiction of the petition of the Georgia Railway and Power Company, seeking to have the commission to approve the street railway fares and rates attached to its petition, or to fix other just and reasonable rates to be charged by your petitioner on its street railways, leaves petitioner remediless, unless this Honorable Court will grant the right of mandamus, directing the said railroad commission to take jurisdiction of the Georgia Railway and Power Company as to the matter of approving the said rates sought by it, or in lieu thereof in fixing other just rates.

55. The suggestion of the commission that the city councils of the cities claiming to have contracts modify the same and that 101 upon such modification the commission would then act and approve the six cents fare sought by petitioner has been rejected by the city council of the city of Atlanta, as will be

seen by a report of a committee to that body, and its resolution which is hereto the court shown, marked "Exhibit P." Upon information and belief petitioner alleges that the other city councils will reject the suggestion of the commission.

Wherefore, your petitioner names the railroad commission of Georgia and C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry as defendants hereto, and respectfully prays:

(1) That this court issues mandamus nisi, directed to the said commissioners, C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry, requiring them to show cause at the time and place to be designated by the court, not less than ten days nor more than thirty days, why mandamus should not be issued against them and each of them and each of them requiring them to take jurisdiction of the petition of Georgia Railway and Power Company, a copy of which is hereto attached, marked "Exhibit B" and to consider and adjudge the same, and to approve or disapprove the street car fares therein sought or in lieu thereof to fix such other fares and rates as may seem just and reasonable to said railroad commissioners, and in the exercise of its jurisdiction in said cause to pass final judgment upon said petition in accordance with what may be equitable and just in the premises.

(2) That on the hearing of the mandamus that it be made absolute, and defendants be required to take jurisdiction of the petition of Georgia Railway & Power Company, a copy of which is hereto attached, marked "Exhibit B" and to consider and adjudge the same and to approve or disapprove the street car fares therein sought, or in lieu thereof to fix such other fares and rates as may 102 seem just and reasonable to said railroad commissioners, and in the exercise of its jurisdiction to pass final judgment upon said petition as to street railroad fares, in accordance with what may be equitable and just in the premises.

(3) That process may issue directed to said defendants requiring them to be and appear at the time and place designated by the court to answer this complaint, and abide by the full orders of the court.

This 22nd day of August, 1918.

KING & SPALDING,  
C. T., L. C., & J. L. HOPKINS,  
BREWSTER-HOWELL & HEYMAN,  
COLQUITT & CONYERS,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
*Plaintiffs' Attorneys.*

## "EXHIBIT F."

GEORGIA,  
*Fulton County:*

Fulton Superior Court, Sept. Term, 1918.

No. 40900.

GEORGIA RAILWAY & POWER CO.

v.

RAILROAD COMMISSION OF GA. et al.

Mandamus.

Now come the Railroad Commission of Georgia, and C. M. Candler, Geo. Hillyer, Paul B. Trammel, Jno. T. Boifeuillet and J. A. Perry, as Railroad Commissioners of said State, and as defendants in the above stated cause, by their attorney, James K. Hines, and for answer to the petition in said case say:

1. These defendants admit the allegations of paragraph, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16 (a), 16 (b), 16 (c), 18, 19, 20, 21, 23, 24, 25, 26, 28, 29, 33, 34, 35, 37, 38, 40, 43, 44, 45, 46, 47, 48, 50 and 52.

103 2. These defendants deny the allegations of paragraph 6 of said petition, except as herein qualified. These defendants submit that the railroad commission of Georgia is without power, authority and jurisdiction to fix fares for applicant where such action would impair valid subsisting contracts between the municipalities in which petitioner operates its street railway lines and petitioner in existence on Aug. 23d, 1907, or where such action would have the effect of repealing ordinances which existed on August 23d, 1907.

3. These defendants deny the allegations of paragraph 12 of said petition.

4. These defendants deny the allegations of paragraph 16 of said petition except as herein qualified.

5. These defendants admit the allegations of paragraph 17 of said petition as except herein qualified. The Rapid Transit Company for a short period during a rate war sold three tickets for ten cents.

6. These defendants deny the allegations of paragraphs 22, 30, 31, and 32 and 36 of said petition.

7. These defendants admit the allegations of paragraph 39 of said petition, except as herein qualified. They deny that the franchise contract therein set out is indefinite.

8. From lack of information, these defendants can neither admit nor deny the allegations of paragraph 41 of said petition.

9. These defendants deny the allegations of paragraphs 42 and 49 of said petition, except as herein qualified. They admit that under the constitution and the laws of this State, the power of fixing railroad fares vested in the legislature except as limited in the constitution itself. Joel Hurt was the only witness who was sworn in behalf of protestants but the latter contended that applicant 104 had not made out a case by its evidence.

10. These defendants admit the allegations of paragraphs 51 of said petition, except herein qualified. They deny that the commission has jurisdiction and authority to grant the increased street railway fares, sought by petitioner.

11. These defendants deny the allegations of paragraphs 53 and 54 of said petition. From lack of information these defendants can neither admit nor deny the allegations of paragraph 55.

Wherefore, having fully answered said petition pray to be hence discharged with their reasonable costs in this behalf expended.

JAMES K. HINES,  
*Atty. for Defendants.*

GEORGIA,

*Fulton County:*

Before the undersigned, personally came C. M. Candler, who on oath deposes and says that he is one of the defendants in the above stated case, and is chairman of the railroad commission of Georgia, and that the facts stated in the foregoing answer are true.

C. M. CANDLER.

Sworn to and subscribed before me this 3 day of Sept. 1918.

J. P. WEBSTER,  
*N. P. at Large.*

#### EXHIBIT "G."

This case coming on to be heard, upon the issues made by the pleadings, and after hearing the same, it is considered, ordered and adjudged by the court that the mandamus prayed for be and the same hereby is denied.

Oct. 2nd, 1918.

GEO. L. BELL,  
*Judge Superior Court, Atlanta Circuit.*

105 Due and legal service of the within petition and rule nisi is hereby acknowledged; copies of each received; filing, time of filing, process, copy process and all other and further notice and service is hereby waived, without prejudice to the right of the defendants to plead to the jurisdiction of the court; said acknowledge

ment to have merely the same force and effect as if said suit were served by the sheriff. This Oct. 18th, 1920.

GA. RY. & POWER CO.,  
GA. RY. & ELEC. CO.,  
By COLQUITT-CONYERS,  
*Their Attys.*

Filed in office this the 19th day of October, 1920.

B. F. BURGESS,  
*Clerk.*

STATE OF GEORGIA,  
*County of De Kalb:*

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY & GEORGIA RAILWAY & ELECTRIC COMPANY.

Complaint, Injunction, &c.

To the Sheriff, or his Deputy, of said county, Greeting:

The defendants are hereby required, personally or by attorney, to be and appear at the superior court, to be held in and for said county, on the first Monday in December, 1920, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness the Honorable John B. Hutcheson, judge of said court, this 19 day of October, 1920.

B. F. BURGESS,  
*Clerk.*

108

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY et al.

And now comes the plaintiff in the above stated case and by leave of the court amends its petition in the above stated case and alleges as follows:

1. That from and after the making of the contract of April 1st, 1903, as shown by Exhibit "B" of plaintiff's petition, and at and before the making of said contract the said electric company charged five cent fare to Atlanta from Decatur and from Atlanta to Decatur over said North Decatur line, and continued this course until this

date; that the construction placed upon the said contract of 1903 as above referred to, by the subsequent conduct of the parties, the said electric company and the said power company, as well as the town of Decatur, your petitioner, and its citizens and others riding upon said cars shows that said contract covered fares from Decatur to Atlanta, and vice versa.

2. That there has never been and discontinuance of the charging of a five cent fare for such service by said electric company or by said power company.

3. That the charging of a five cent fare by the said companies as above stated has been continued during said time from all points in the said town of Decatur to Atlanta and all points on defendants lines as specified in said contract, and from Atlanta and all points as aforesaid to all points in the said town of Decatur; that neither said electric company nor said power company has ever contended that said service for five cent fare extended only from terminus to terminus; that said electric company and said power company and said town of Decatur and its citizens have always during a period of seventeen or eighteen years construed the said contract as above stated, that is, that the five cent fare shall be charged from 107 any point in the town of Decatur to Atlanta and all points as aforesaid and from Atlanta and all points as aforesaid to any point in the town of Decatur.

4. That some time during the year 1918, the said power company filed with the railroad commission of Georgia an application stating therein certain facts and circumstances which it claimed entitled it to charge six-cent fare where it was before charging five cent fare, and to charge two cents for all transfers; and prayed the said commission to put such new schedule of rates into operation.

5. That the municipalities of Atlanta, Decatur, Hapeville, East Point and others, were duly notified of such application; and all or some of them, including the town of Decatur, took part in defending against said increase.

6. That a copy of this application is attached to the petition for mandamus attached to this amendment, and marked Exhibit "H" of said petition, by the said power company against the railroad commission of Georgia, said case being number 40900 of Fulton superior court, and petitioner hereby refers to the same and adopts the same as a more full and complete illustration and exhibit of the facts therein set forth for the purposes herein set forth.

7. That upon the first hearing upon said petition before the said railroad commission of Georgia, the said commission held itself to be without jurisdiction to grant the relief therein prayed for on account of the various franchise contracts which had been entered into by the said power company or its predecessors.

8. That thereupon the said power company filed in said Fulton superior court a petition for a mandamus against the said com-

mission asking the said Fulton superior court to require the said commission to take jurisdiction of the same; that upon the 108 hearing of the said mandamus the trial judge denied the mandamus absolute; that thereupon the said power company appealed said case to the Supreme Court of Georgia; that said Supreme Court affirmed the judgment in part and overruled it in part; that the effect of said judgment of the Supreme Court was to hold that the franchise contract of the town of Decatur was valid and subsisting when the act of August 23d, 1907 was passed; that its existence and effect was to deprive the railroad commission of jurisdiction to increase the town of Decatur fares on the North Decatur line and that so far as fares of the town of Decatur on the North Decatur line are concerned the judgment of the trial court was affirmed.

9. That in the said case in Fulton superior court and in the Supreme Court, while your petitioner was not an actual party it was a party in that it was being represented by the said railroad commission; that it was estopped by the final judgment in said case; that the estoppel between it and the said power company was mutual and that the said power company is estopped from attacking final judgment in said cause and the judgment thereunder is res adjudicata between your petitioner and the said power company by reason of the facts herein set forth—that the documents attached to this amendment and marked Exhibit "J" constitute a full, true, complete and accurate transcript and copy of the whole record in the said mandamus case of Georgia Railway & Power Company v. Railroad Commission of Georgia et al., being Number 40900 in Fulton Superior Court, said record being that referred to in paragraphs 18, 19, 20, 21 and 22 of plaintiff's original petition; said Exhibit "J" including the various pleadings, orders and other documents in said mandamus case.

10. That on or about the second day of April, 1919, said railroad commission finally acted upon the said application of the 109 power company under the mandamus and entered an order therein, the formal part of which is hereto attached as a part hereof and marked Exhibit "I."

11. That two regular sessions of the general assembly of Georgia have been held since the ruling of the Supreme Court in the said mandamus case; that the general assembly of Georgia has not passed any measure or bill nullifying the said franchise contract with your petitioner or nullifying the effect of the proviso in the act of August 23d, 1907, or giving the said commission the power to increase fares to the town of Decatur on the North Decatur line, or increasing said fares itself, or giving any other agency of the State power to do so; that on the other hand, the general assembly of Georgia expressly refused to nullify the effect of the said proviso or to give the railroad commission jurisdiction over rates fixed in such contracts; and again exercised the sovereignty of this State in favor of these contracts.

12. That conduct on the part of the said power company and said electric company in line with their threat set forth in said written notice attached to the petition and marked Exhibit "D" will be in absolute violation and breach of the franchise contract set forth in Exhibit "B," that a seven cent fare has not been legally and regularly fixed as to the town of Decatur on said North Decatur line by anybody or by any agency of the State having the power so to fix it; that any effort to put such a fare into effect by the said power company or by anybody else at this time is in violation of law and in violation of the terms and conditions of such contract; that said contract is now and has all the while been a valid contract binding upon the said electric company and the said power company and that the said companies are estopped to attack its validity.

13. That the said electric company and the said power company have all the while occupied the streets of the town of Decatur and are now occupying the same, and operated the lines in said town of Decatur under and by virtue of said franchise contract of 1903, which they were by said contract of 1903 given the permission to double-track and as described and set forth in said contract of 1903 attached to petition and marked Exhibit "B" and said companies and each of them are now estopped from denying the absolute validity of said contract upon any ground and for any reason whatsoever.

14. That one of the considerations of the said contract of 1903 shown by Exhibit "B" of the petition was the franchise given to said electric company to double-track the line formerly known as the rapid transit line now known as the North Decatur line, over the streets in the town of Decatur; said contract granted to said electric company permission to construct said double-track over the streets in the town of Decatur; said franchise was accepted by said electric company and afterwards said electric company, taking advantage of said franchise did construct said double-track over the streets in the town of Decatur and said double-track constructed under said franchise still remains upon said streets, and said companies are now occupying said streets and their tracks upon said streets under and by virtue of said franchise.

15. That said electric company and said power company are still in possession of and still enjoy the benefits that were derived from the discontinuing and taking up of the structures comprising the said Atlanta Railway Company and still continues to deprive the town of Decatur and its citizens of the benefits derived by said town and citizens from said Atlanta Railway Company; and because of these facts as heretofore stated and as recited in the petition, either and each of them are now estopped from denying the validity of said contract of 1903.

16. That any such violation of the terms of said contract as is threatened will be a positive violation of the laws of said State on the part of said power company and said electric company.

17. That said power company and said electric company threaten to be guilty of a breach of said franchise contract and successive and recurring breaches of the same; and give no reason or justification for said threats except that they claim that the said contract is now invalid; it does not pretend that any new rate or any rate of seven cents has been regularly or legally put in operation; petitioner alleges that said companies has no power to regulate the rates of fare; that they have received no authority from the said commission, nor from anybody else to put said increased rate into operation; and that any effort by them to put in operation any increased fare is in absolute violation of said contract and of the law governing in such cases.

18. That said contract was made by the State for the benefit of the general public, and every member of the general public has an absolute right to its complete enforcement and performance; that any effort to put into operation the threats mentioned will cause untold confusion, strife, disorder, and there are no adequate means of avoiding such consequences, except by the intervention of an injunction.

19. That the damages incident to the violation of said contract, and the recurring violations thereof, will be impossible of computation; that the injury therefrom will be irreparable; that there is no just or adequate means or method of measuring either the extent of the damage or the extent of the injuries accruing therefrom.

20. That any such effort on the part of said power company to put into operation such increased fare will result in an impairment of said contract.

112 21. That any such effort on the part of said power company to put into operation such increased fare will result in taking the property of your petitioner, and the property of the members of the public, without due process of law.

22. That any such effort on the part of the said power company to put into operation such increased fare will be an unauthorized and illegal effort to exert the sovereignty of this State in opposition to the said contract.

23. That the town of Decatur has been largely built up and populated on the strength of a five cent street car fare; that the same has been in operation there for a long time; and any unauthorized disturbance of the same will have a very great disorganizing and depressing result on the values of property, and upon the comfort and convenience of the local public.

24. That said power company is not entitled to earn a profit on every part of its entire system; that if it is in fact losing money on the Decatur traffic, which your petitioner denies, the railroad commission has fixed a certain increased fare on its whole system which is presumed to be a fair return on its whole investment; and the fact that a less fare is operative in Decatur is of no concern to it.

25. That there is no adequate remedy at law either for the protection of your petitioner, or of the members of the public, as to the matters herein set forth.

26. That the threatened conduct on the part of said power company will be in violation of art. 1, sec. 3, par. 2 of the constitution of Georgia, which provides as follows: "No law impairing the obligation of contracts \* \* \* shall be passed."

27. That the threatened conduct of the said companies will be in violation of art. 1, sec. 10, par. 1, of the constitution of the United States which provides as follows: "No State shall pass any law impairing the obligation of contracts."

28. That the threatened conduct of the said companies will be in violation of art. 1, sec. 1, par. 3, of the constitution of Georgia, which provides as follows: "No person shall be deprived of \* \* \* property, except by due process of law."

29. That the threatened conduct of the said companies will be in violation of the fifth amendment to the constitution of the United States, which provides as follows: "No person shall be deprived of property, without due process of law; nor shall private property be taken for public use without just compensation."

30. That the threatened conduct of the said companies will be in violation of the fourteenth amendment to the constitution of the United States, which provides as follows: "Nor shall any State deprive any person of \* \* \* property, without due process of law."

31. That the threatened conduct of the said companies will be in violation of art. 1, sec. 3, par. 1, of the constitution of Georgia, which provides as follows: "Private property shall not be taken, damaged, for public purposes, without just and adequate compensation being first paid."

Wherefore, your petitioner prays as follows:

(1) That said electric company and said power company be restrained and enjoined from putting into operation any or all of their threats set forth in said Exhibit "D" of any part thereof.

(2) That said injunction shall continue to operate as against an increase of fares from Decatur to Atlanta and vice versa, until the same is allowed by the laws of this State.

114 (3) That said electric company and said power company and each of them be restrained and enjoined from in any manner violating the franchise contract set forth in Exhibit "B."

(4) That said companies and each of them be restrained and enjoined from in any manner changing the present status as to fare transfers, as to your petitioner and the said North Decatur line.

(5) That if it has not already been decreed by the courts that it be decreed that said franchise contract set forth in Exhibit "B" is a valid and subsisting contract and now binding between your petitioner and each of said companies.

(6) That said electric company and said power company be required specifically to perform said franchise contract set forth in Exhibit "B."

(7) That any and all further relief, both legal and equitable, be granted to your petitioner which may be warranted by the above stated facts.

L. J. STEELE,  
FRANK HARWELL,  
GREEN, TILSON & MCKINNEY,  
*Petitioner's Attorneys.*

STATE OF GEORGIA,  
*County of De Kalb:*

Personally appeared before the undersigned officer L. J. Steele who says on oath that he is Mayor of the Town of Decatur, and that the facts stated in the foregoing amendment are true as they stand stated.

L. J. STEELE.

Subscribed and sworn to before me this 26th day of November, 1920.

B. F. BURGESS,  
*Clerk Superior Court, De Kalb County, Ga.*

115 EXHIBIT "I."

*Order of Railroad Commission.*

Upon consideration of the record in the above stated application, including the decision of the Supreme Court, on appeal in the mandamus proceedings brought by the company and the mandamus issued by Hon. Geo. L. Bell, judge of the superior court of Fulton county; and also an opinion this date adopted by the commission containing its findings of facts and conclusions therein with respect to the issues involved, which said opinion is hereby referred to and made a part hereof, the commission hereby amends its order dated August 14, 1918, by adding thereto after schedule O, the following rate schedule, together with the conditions and limitations provided herein:

Schedule P, Street Car Fares.

The Georgia Railway and Power Company is hereby authorized to charge as its maximum passenger fare the sum of six (6¢) cents per passenger, where a five cent (5¢) fare is now charged, for one continuous ride on its passenger cars over and on its lines of railway, or

any zone thereof as now prescribed; except such fares as are fixed by the contracts between the company and the cities of Decatur and College Park, which shall remain as so fixed. Provided however, that the Georgia Railway and Power Company shall put on sale and sell, at its offices and with its conductors, books of tickets, containing 17 coupons, each good for one ride and transfer if desired, at the price of one (\$1.00) dollar per book.

Order- further, that no change shall be made in the existing rules and practices of said company as to the granting of transfers or the transportation of infant children.

Order- further, that the effective date of this amendment to the commission's order dated August 14, 1918, shall be April 14, 116 1919, provided the company shall on or before 12 o'clock noon, April 9, 1919, file with this commission a duly authorized and executed agreement or stipulation to pay as called for by the commission sixty (60%) per cent. of the total cost of any appraisal of its properties and audit of its books, which may be ordered and directed by the commission under any agreement or understanding hereafter entered into between the commission and the city of Atlanta, Ga.

Order- further, that three days prior to the effective date of this order the company shall cause to be posted on all of its cars notice to the public of the authorized increase in street car fares and the effective date of such increases.

By order of the Commission.

C. M. CANDLER,  
*Chairman.*

ALBERT COLLIER,  
*Secretary.*

“EXHIBIT J.”

STATE OF GEORGIA,  
*County of Fulton:*

To the Superior Court of said county:

The petition of Georgia Railway & Power Company shows as follows:

1. The Georgia Railway & Power Company is a resident of the county of Fulton, incorporated under the general laws of this State incorporating street railway companies, authorized and empowered by its charter to operate, construct and maintain street railways and electric plants for the generation of heat, power and light.

2. Under said charter, the Georgia Railway & Power Company now operates and maintains, and has for years past operated and maintained a system of street railways, occupying various streets and private rights of way in the city of Atlanta, and in the towns 117 of Decatur, Edgewood, Kirkwood, East Point, College Park and Hapeville, and on certain public roads, highways and private rights of way in the counties of Fulton and De Kalb, operat-

ing said railway system as lessee of the Ga. Railway and Electric Company.

3. The Railroad Commission of Georgia is a body of public officials, created by the laws of Georgia, with its domicile in the county of Fulton, said State, consisting of five commissioners, to wit: C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry.

4. Prior to the act of 1907 it was within the jurisdiction of the railroad commissioners, vested exclusively in them, to determine what was just and reasonable rates and charges to be observed by all railroad companies doing business in this State; and it was further the duty of said commissioners to make reasonable and just rates of freight and passenger tariffs to be observed on the railroads hereof; and to make reasonable and just rules and regulations to be observed by all railroad companies doing business in this State as to charges for the necessary handling and delivering of all freight; to make such just and reasonable rules and regulations as may prevent unjust discrimination in the transportation of freight and passengers on the railroads in this State; and to make just and reasonable joint rates for all connecting railroads doing business in this State, and for all traffic or business passing from one of said roads to another.

5. By an act approved August 23, 1907, enlarging the duties of said railroad commission, the powers and duties of that body were enlarged as follows:

"The powers and duties hereinbefore conferred by law upon the railroad commission are hereby extended and enlarged so that its authority and control shall extend to street railroads and street railroad corporations, companies or persons owning, leasing or 118 operating street railroads in this State; provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company; and provided that this section shall not operate as a repeal of any existing municipal ordinance." (Section 2633.)

6. After the passage of this act of 1907, subject to the provisos herein, it was within the power, and it was the duty of said railroad commission to make, to be observed by the Georgia Railway & Power Company, a schedule of just and reasonable rates of charges for transportation; and from time to time to review said rates and charges, increasing or lessening the same as the occasion might demand, so that at all times the rates, fares and charges of said Georgia Railway & Power Company should be just and reasonable, both as to the said power company and to its patrons, the public.

7. The Atlanta Street Railroad was Atlanta's original and principal street railway. It included the line of Peachtree and Whitehall Streets, Decatur Street, Ponce de Leon Avenue, Mitchell Street, Nelson Street, Peters and Broad Streets, Capitol Avenue, and other streets.

8. On January 1, 1869, the city granted consent to this street railroad company to occupy the streets of said city, by an ordinance, one of the conditions of which was as follows:

"4th. The charges for passage on said road shall not exceed twenty cents for any through line and not exceeding ten cents for half line or short distances."

(This appears in City Code of 1899 as section 1314, and in City Code of 1910 as 2697.)

9. On December 18, 1882, the city of Atlanta granted its consent to the Metropolitan Street Railway Company to occupy certain streets upon condition that "franchises granted subject to the conditions and limitations of ordinances heretofore passed in reference to the Atlanta and Gate City Street Railroad Companies."

10. On July 4, 1887, the city granted its consent to the Atlanta and Edgewood Railroad Company to occupy its streets upon the same terms and conditions as those pertaining to Atlanta Street Railroad Company, thereby making the same provisions as to fares for the Atlanta & Edgewood Street Railroad Company as existed for the benefit of the Atlanta Street Railroad Company.

11. On December 7, 1891, the city of Atlanta granted its consent to the Atlanta Consolidated Street Railroad Company to occupy its streets, as follows:

"The rights and franchises consented to and granted to said several street railroad companies (including Atlanta Street Railroad Company) \* \* \* are hereby re-consented and re-granted to said Atlanta Consolidated Street Railroad Company on the terms specified in the said grants both as to privileges and obligations."

12. In the consents granted to the constituent companies of the Atlanta Consolidated Street Railroad Company on December 7, 1891, there was no provision for a fixed fare other than the fare fixed for the Atlanta Street Railroad Company.

13. On August 23, 1899, the city of Atlanta granted a consent to the Atlanta Rapid Transit Company to occupy with its lines the following streets in said city: Auburn Avenue, Ivy Street, Courtland Street, Juniper Street, Forest Avenue, Hunter Street, Woodward Avenue, Cherokee Avenue, Walton Street, Luckie Street, Jones Avenue, Gray Street, Kennedy Street, English Avenue, and Bellwood Avenue.

Among the terms of this consent were the following:

"This grant is made on the further condition that the charge for fare for a single passenger from any point on the lines of said company to any other point on the lines of said company within the city limits of Atlanta as now or hereafter defined shall not exceed five cents, except on cars that may be run after

midnight and before five o'clock a. m., for which fares for single passengers as aforesaid shall not exceed ten cents."

14. Prior to February 8, 1902, the name of Atlanta Consolidated Street Railroad Company had been changed to that of Atlanta Railway & Power Company, and there was in existence at said time in Atlanta only two street railway companies, the Atlanta Railway & Power Company and the Atlanta Rapid Transit Company.

15. These two railroad companies, together with the Georgia Electric Light Company and the Atlanta Steam Company desired to consolidate, and the consent of the city was sought to permit and authorize such consolidation. This consent of the city was obtained, and it was embodied in what is known as the "Consolidation Ordinance" of February 8, 1902, a copy of which ordinance is hereto attached marked "Exhibit A."

16. The paragraphs hereinabove include all that can be claimed as contracts or franchise ordinances existing between the city of Atlanta and the Georgia Railway & Power Company.

The net result of these so-called franchise contracts, at the date of the Consolidating Ordinance, February 8, 1902, was:

(1) All the railroad lines in the city of Atlanta, except those of the Rapid Transit Company had no limit as to fares or had a maximum limit of twenty cents and a minimum of ten cents, as hereinabove stated.

(2) The Rapid Transit Company had a maximum limit of ten cents and a minimum of five cents, as above stated.

16-A. On October 19, 1898, the city of Atlanta granted its consent to the Atlanta Railway Company to construct its lines of railway on certain streets in the city of Atlanta. One of the terms of such grant is as follows: "And on condition also that said Atlanta Railway Company, and its successors and assigns, by accepting this grant, or operating any of the lines covered by this grant, agree upon the payment of one fare not to exceed five cents, to transport any passenger from his initial point within the limits of the city of Atlanta to his destination within the city of Atlanta, as its limits now exist, or may be hereafter extended, by continuous passage upon any line, etc." (See 1st paragraph on page 280.)

16-B. However, by ordinance adopted March 30, 1899, the city of Atlanta amended the ordinance or franchise last above referred to as follows: Said ordinance "is amended so as to relieve the Atlanta Railway Company from certain of the conditions annexed by said original ordinance to the granting of authority and consent as aforesaid, to wit, the city of Atlanta relieves said company as to the lines to be constructed under said original ordinance from the right reserved by the city of Atlanta to require the granting of transfers, and the regulations of fares as therein provided for." A copy of said ordinance is hereto attached marked Exhibit —, and made part hereof.

16-C. Petitioner avers that the property and franchise of the Atlanta Railway Company were conveyed and transferred to the Atlanta Railway and Power Company, were owned and controlled by it on February 8th, 1902, and thereafter were conveyed and transferred by it to Georgia Railway and Electric Company.

17. As a matter of practice, all the street car lines in the city of Atlanta had, for some time prior to February 8, 1902, charged five cent fare for day passengers and up to twelve o'clock midnight, and ten cents passage after twelve o'clock midnight, and until five o'clock in the morning.

122 The Rapid Transit Company, had for a considerable time prior to the month of August or September in the year 1901, sold three fares for ten cents, but at the date of the Consolidating Ordinance, and some months prior thereto, that company had charged five cents for day travel, and up to twelve o'clock midnight, and ten cents for passage between twelve o'clock and five o'clock. Both of the street railway systems then in existence had, prior to the passage of the Consolidating Ordinance, granted limited transfers.

18. After the passage of the Consolidating Ordinance Atlanta Railway & Power Company, Atlanta Rapid Transit Company, Georgia Electric Light Company and Atlanta Steam Company consolidated under the name of Georgia Railway & Electric Company.

123 The ordinance itself was elaborate and carefully drawn and made no direct provision as to rates. The only provision relating to fares was a provision for transfers, wherein provision was made for one transfer on payment of one full fare. No amount is specified in this ordinance as to what constitutes a full fare.

19. The purpose and intent of this Consolidating Ordinance is amply stated in the ordinance itself:

"It being the intention hereof to allow the full and free consolidation of the companies heretofore referred to and their properties whereby the freest possible use and profit thereof may result to said consolidated company and so that said company may consolidate, control and operate all of said properties as it may desire, subject only to proper police laws and restrictions."

20. At the date of the passage of the Consolidating Ordinance there was in the City Code of Atlanta (City Code of 1899, Section 1351-H) an ordinance providing that no street railway company thereafter should "Be permitted to collect for fares for single passengers from one point of the line or system of such company in the city limits aforesaid more than for one continuous trip from five A. M. to twelve o'clock, midnight, five cents, nor more than, for one continuous trip from 12 P. M. to 5 A. M., ten cents."

The Consolidating Ordinance repealed that provision of the City Ordinance in the following words:

"That the general ordinance on the subject of street railways and their operation and control, approved August 22, 1899, and co-

tained in the City Code, section- 1351-A to 1351-M, both inclusive, be and the same are, hereby repealed."

21. Your petitioner shows that unless there has been made 124 a contract between the City of Atlanta and your petitioner with reference to fares upon its street railways by virtue of the ordinances above set out, then there is no contract between the City and your petitioner with reference to street railway fares.

22. Petitioner shows that the City of Atlanta neither now has, nor has it ever had, except as set out in the charter to the Atlanta Street Railroad Company, any power granted it under the constitution or laws of this State to contract with your petitioner as to the fares to be charged on its lines of street railway.

The City of Atlanta, therefore, has no power to contract with petitioner with reference to fares, and if it has undertaken so to do the results thereof are void under the law.

23. The City of Atlanta passed an ordinance prior to the Code of 1899, known as Section 1314 of that Code, as follows:

"The charges for passage on said roads shall not exceed twenty cents for any through line, and ten cents for half lines or short distances."

To this section is this foot-note: "This section had reference to old lines of the Atlanta Street Railroad Company."

24. This same section was codified in the City Code of 1910, as follows:

"Sec. 2697. Grade Charges for Fare on Road (this section had reference to old lines of the Atlanta Street R. R. Co.).—The charge for passage on said roads shall not exceed twenty cents for any through line, and ten cents for half lines or short distances."

25. In 1897, the City of Atlanta passed the following 125 ordinances, known as Sections 1335 and 1336 of the Code of 1899:

"Sec. 1335. From and after the first day of May, 1897, it shall be unlawful for any company operating electric or other railways in or upon the streets of Atlanta, or by itself or its agents, directly or indirectly to charge or collect more than five cents for the transportation of any person from any point on said line or lines to any other point on any line or lines owned or operated by said Company, whether the same be for a continuous passage on a through line or by transfer to any other line or lines owned and operated by said company."

"Sec. 1336. Upon the payment of one full fare, as above provided, it shall be the duty of said railway company to transport such passenger to his destination, upon any line or lines of said company and to furnish a transfer ticket, without additional charge, whenever it is necessary for such passenger to change to the car of any

other line or lines operated by said company, in order to reach his said destination."

The City of Atlanta, in 1898, sought to enforce the above sections of the Code, sections 1335 and 1336, and the Atlanta Consolidated Street Railway Company, one of the predecessors in title and franchise of petitioner, enjoined their enforcement upon the ground of lack of power in the City. (City of Atlanta v. Old Colony Trust Company, 88 Fed. 859). That case ended any effort on the City's part to fix fares by means of this ordinance.

26. In spite of the case in 88 Federal 859, these sections were re-codified in the City Code of 1910, as Sections 2721 and 2622 of that Code. The City of Atlanta since the rendition of the 126 decision in the Old Colony Trust Company case and the compiling of the Code of 1910, has obtained from the Legislature no further nor additional charter power with reference to street railway fares.

On August 22, 1899, the City of Atlanta passed the following ordinance with reference to street railways:

"Section 1351-H. No person, firm, corporation or Association hereafter obtaining authority or consent to construct or operate a line or system of street railways in the limits of the City of Atlanta, as now or hereafter defined, shall be permitted to collect for fares for single passengers from one point of the line or system of such company in the City limits as aforesaid, more than for one continuous trip from 5 A. M., to 12 P. M., five cents, nor more than for one continuous trip from 12 P. M., to 5 A. M., ten cents."

This ordinance was codified in the City Code of 1899 as Section 1351-H, and in the City Code of 1910 as Section 2758.

28. The ordinances above quoted, known as Section 1351-H of the Code of 1899, and as Section 2758 in the Code of 1910, have been repealed by Section 6 of the Consolidating Ordinance as follows:

"Sec. 6. Be it further ordained, That the general ordinance on the subject of street railways and their operation and control, approved August 22, 1899, and contained in the City Code, Section- 1351-A to 1351-M, both inclusive, be and the same are, hereby repealed."

This section 6 just above repealing Section- 1351-A to 1351-M of the City Code, was modified, however, by Section 12 of the repealing ordinance so that the repeal was applicable only to those 127 companies taking advantage of the Consolidating Ordinance.

29. Section 12 provided "that no benefit hereunder and no repeal of any ordinance or part thereof made hereby, shall accrue or apply to any of said companies not included in said consolidated company, but as to any company which does not come into the consolidation provided for hereby the city shall and does preserve all said ordinances and all powers and rights which the City now has or may hereafter acquire."

30. The Consolidating Ordinance was dealing with all the street railway companies and all the electric companies then in Atlanta, and it was evidently the purpose of the City to end all the contests between these companies, then long outstanding, by bringing them all under one management and control. To that end, it repealed, as to those entering the consolidation, all those ordinances approved August 22, 1899, including the five cent fare provisions, but expressly keeping it in force as to all companies not entering into the consolidation.

The result was not that the five cent fare ordinance was wholly repealed, nor, indeed, in a strict sense, repealed at all. It was repealed as to the consolidating companies, now the Georgia Railway & Power Company, but it remained of force as to all other railway and power companies, and was included in the Code of 1899, with limited application, and was properly incorporated into the new Code of 1910, together with the consolidating ordinance, with the very same limitations.

31. Petitioner shows that it was decided in the Old Colony Trust Company case, *supra*, that the City of Atlanta had no authority to pass the city ordinances enacted in 1897, and if the City lacked the charter power to pass that ordinance, it also lacked the charter power to pass the ordinance of 1899.

128 Your petitioner, therefore, alleges that there are outstanding no valid ordinances fixing street railway fares in the City of Atlanta, and that the City lacked the charter power to pass any such ordinances.

The ordinances of 1897, even if valid (which petitioner denies) was repealed by the ordinance of August 22, 1899, and the ordinance of August 22, 1899, was repealed so far as petitioner is concerned by the Consolidating Ordinance of 1902.

32. Therefore, your petitioner alleges that there is no valid subsisting contract now in existence fixing fares, nor was there such contract in the year 1907 between the City of Atlanta and your petitioner, nor any municipal ordinance fixing said fares now existing, nor was any such ordinance in existence in the year 1907.

33. The Town of Edgewood was once a separate and independent municipality. It has since disappeared, its territory having by an act of the Legislature been added to the City of Atlanta.

34. When existent it granted to Collins Park & Belt Railroad (whose lines are now operated by the Georgia Railway & Power Company, by lease from Georgia Railway & Electric Company) the right to occupy the main Decatur Road (one of its then streets); "Provided, that the fare shall be five cents and transfers from all parts of Edgewood to all parts of Atlanta." This consent was only for a single track.

35. After the Georgia Railway & Electric Company purchased this Decatur Road line from Collins Park & Belt Railroad Company,

it was found desirable to put a double track on the "Main Decatur Road." The Town of Edgewood consented thereto as follows:

129 "The rates of fares for the transportation of passengers between any point on said line within the present limits of the Town of Edgewood and any point in the City of Atlanta shall not exceed the rate of fares charged between Inman Park and other points in the City of Atlanta."

36. This latter consent does not expressly repeal the one just above; but it clearly does so by necessary implication. The first provides for five cents without limitation or condition. The second makes the fare "between Inman Park and other points in the City of Atlanta" the standard, so that the fare might be more or less than five cents. If the Railroad Commission should raise or lower the rates in Atlanta, the fare under the conditions of this consent would automatically likewise rise or fall. The condition of this consent applies only to one line in the Edgewood territory, leaving no conditions as to the South Decatur line.

37. The Georgia Railway & Electric Company in and prior to 1907 had two lines in the Town of Decatur, one known as the main Decatur line, bought from the Rapid Transit Company, running north of the Georgia Railway, and the other known as the South Decatur line, running south of the Georgia Railroad. There is no pretense that there is any contract—franchise or otherwise—fixing rates as to the South Decatur line.

38. In the original consent for the initial construction of the Main Decatur line there *was* no rate provisions. Thereafter, the Georgia Railway & Electric Company purchased a line, then in Decatur, from the Atlanta Railway & Power Company. The Georgia Railway & Electric Company in March, 1903, desired to discontinue this last line and physically removed it from the streets of Decatur. This was at first resisted by the town, but afterwards an agreement was made between the parties consenting to the removal of the line upon the following basis:

130 "To never charge more than five cents for one fare upon its main Decatur line for one passenger for one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of same in the Town of Decatur, and vice versa—though a greater fare may be charged when passengers are transported between the hours of twelve o'clock midnight, and five o'clock A. M.

"To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said City, and vice versa, etc."

39. The only franchise contract claimed between East Point and this Company in existence in 1907 is as follows:

"Passengers from all parts of the Town of East Point shall be accorded each and every privilege and right which may be accorded citizens of Atlanta with regard to transportation."

The indefiniteness of this provision is at once apparent. It is not at all certain that it applies to the subject of fares. If so, it would seem to regulate only within the corporate limits of East Point, and not from all points within those limits to all points on the railway system beyond such limits.

40. The only franchise contract that can be claimed that existed between College Park and petitioner in 1907 was as follows:

"That no greater fare than that of five cents for each passenger be charged for passage from the Southern limits of said City of College Park to some central point in the City of Atlanta."

There was in this franchise no provision as to transfers.

131 41. Other than is above set out, there was in 1907 in existence no contract franchises or otherwise between petitioner and the Towns of Edgewood, Decatur, East Point and College Park, fixing fares to be charged on petitioner's lines of railway, nor except the franchise ordinances above referred to, were there any ordinances in the Towns of Edgewood, Decatur, East Point and College Park, seeking to fix the rates that could be charged by petitioner upon its lines of railway.

42. Your petitioner charges that neither of the Towns of Edgewood, Decatur, East Point and College Park had charter power to make with your petitioner contracts fixing street railroad fares, and any contracts sought to be made by either of said Towns with petitioner was null and void for lack of power on behalf of all said Towns to make such contract; nor did either of said Towns have charter power to pass any ordinance fixing the rates of fares that petitioner should charge upon its lines of railway.

Under the constitution and laws of this State, the power of fixing railroad fares, either adversely or by contract, is vested in the Legislature, and such powers have not been granted to said municipalities by the General Assembly.

43. On the 16th day of April, 1918, the Georgia Railway & Power Company filed its petition with the Railroad Commission of Georgia, alleging *inter alia*:

"That said rates for the service of electric current and street car fares and gas now on file with this Honorable Commission are wholly inadequate and insufficient to furnish sufficient income to properly care for and preserve its properties and adequately and efficiently serve the public.

132 "That the said rates are so low as to be inadequate and insufficient to pay the cost of the service and yield a reasonable return on the investment necessary to render the service.

"That it is directly and immediately in the interest of the public locally and throughout the entire territory served by it and for the national welfare that petitioner be granted an increase in its rates in order to keep it a going concern and enable it to properly and effectively serve the public. Petitioner is ready and will disclose at the hearing all facts and give all information and details desired by the Honorable Commission."

44. To this petition, duly filed and served, there was attached a formulated table of rates for gas, electric current and street car fare which petitioner alleged was fair and reasonable and which was necessary to enable petitioner to continue in the discharge of its duties and responsibilities to the public and to preserve it as a useful public service corporation. Your petitioner prayed "the approval of this Honorable body of the said table of rates so formulated in order that the same may become effective."

A copy of said petition together with the attached formulated table of rates which petitioner desired to be permitted to charge is hereto attached marked "Exhibit b."

45. After said petition had been filed with the Railroad Commission and properly served under its rules and regulations, the same was set for a hearing and a painstaking and exhaustive hearing before said Commission was had, extending over several weeks.

46. At and during said hearing petitioner brought before the Commission oral testimony covering several hundred pages of 133 typewritten matter and introduced into the hearing all of its records and books, all of which, as petitioner contends, showed clearly that the rates and charges which the Commission was asked to approve were just, fair and reasonable and necessary for the protection of the public as well as essential to the welfare of petitioner.

47. A defense was made to said petition, Exhibit B, by attorneys purporting to represent certain municipalities and manufacturing interests, including among the municipalities the cities of Atlanta and Decatur. The cities of Atlanta and Decatur alone attacked the jurisdiction of the Commission to fix the sought for street railway fares.

48. These cities not only deny that the street railway fares which the Commission was asked to approve were just and reasonable, but alleged the existence of certain contracts between petitioner and the cities of Atlanta, Edgewood, Decatur, East Point and College Park which brought petitioner within the proviso of the Act of 1907, thereby taking from the Commission the jurisdiction to fix rates in said cities and in the counties of Fulton and De Kalb.

49. To sustain the contention that the street railway fares and charges which the Commission was asked to approve were not just and fair, defendants, depended upon the testimony of Mr. Joel Hurt dealing with what he declared to be the unfair capitalization of the

Georgia Railway & Power Company, and upon the testimony, oral and written, introduced by petitioner.

134 50. On the question as to the jurisdiction of the Commission to approve the street car fares and charges sought by petitioner upon its lines of street railway in the cities of Atlanta, Edgewood, Decatur, East Point and College Park and on the roads and highways of the counties of Fulton and De Kalb defendants introduced before the Commission the following testimony:

(1) The charter of the Atlanta Street Railroad Company, dated February 23, 1866, appearing in Georgia Laws 1865-6, page 201, copy of which is hereto attached, marked "Exhibit E."

(2) Amended charter of the Atlanta Street Railroad Company, dated December 26th, 1890, appearing in Georgia Laws for the years 1890-91, page 283, copy of which is hereto attached and marked "Exhibit F."

(3) Charter of the Atlanta Consolidated Street Railroad dated May 16, 1891, which is hereto attached and marked "Exhibit G."

(4) Charter of the Georgia Railway & Electric Company dated January 28, 1902, a copy of which is hereto attached marked "Exhibit H."

(5) Deed from the Atlanta Street Railroad Company to the Consolidated Street Railroad Company, recorded in Book C-4, page 669 of Fulton County Records, copy of which is hereto attached marked "Exhibit I."

(6) Deed of Atlanta Railway & Power Company to the Georgia Railway & Electric Company, recorded in Deed Book 160, page 182, of Fulton County Records, copy of which is hereto attached marked "Exhibit J."

(7) Resolution of the City Council of Atlanta passed and adopted January 1, 1869, copy of which is hereto attached marked "Exhibit K."

135 (8) Ordinance of City of Atlanta granting the right to merge certain lines of railway in the City of Atlanta, dated December 7, 1891, copy of which is hereto attached marked "Exhibit L."

(9) An ordinance of the City of Atlanta allowing the Atlanta Railway & Power Company and certain others to transfer property and franchises, to the Georgia Railway & Electric Company, adopted January 27, 1902, copy of which has already been attached, marked "Exhibit A."

(10) An ordinance of the City of Atlanta dated March 11, 1912, copy of which is attached, marked "Exhibit M."

51. Petitioner avers that the above sub-paragraphs numbers 1 to 10, inclusive, together with the franchise ordinances in the nature

of contracts and the ordinances seeking to fix the fares charged, heretofore in this petition set out, was all the evidence before the Commission and includes all the evidence that can be produced before the Commission dealing with their jurisdiction to fix and approve the street railroad fares sought by your petitioner; and your petitioner alleges that under said evidence the Commission has jurisdiction and authority to consider the petition of the Georgia Railway & Power Company and to grant the increased street railroad fares sought, provided they find, as they did, that the same are just and reasonable.

52. Petitioner shows that after hearing the evidence and argument on said petition, the Railroad Commission finally on the 14th day of August, 1918, passed final judgment thereon, in which various changes were made in the charges, rates and fares of petitioner as to

gas, light and power, resulting in the main in an increase of rates, charges and fares over said rates, charges and fares in force 136 prior to the filing of the petition above referred to, but declined to grant the increase of street railway fares sought for the sole reason that under the proviso of the Acts of 1907 they did not have jurisdiction to fix street railroad fares in the cities of Atlanta, Edgewood, Decatur, East Point and College Park; and while the Commission did not grant the prayer of petitioner as to street railroad fares because of lack of jurisdiction, as is just stated, the Commission did find that as a matter of fact the street railroad fares in the cities aforesaid were too low and that in fairness and justice they ought to be increased to six cents instead of five, and that if the cities concerned would change their ordinances they would at once act and allow a six cent fare instead of five cents. A copy of the official order of the Commission is hereto attached marked "Exhibit N."

53. Said Commissioners erred in declining to take jurisdiction in the matter of approving and fixing just and reasonable street railroad fares as prayed for by your petitioner.

(1) Because there are no contracts, valid or otherwise, between the City of Atlanta and your petitioner, fixing the street railroad fares, nor was there in existence in 1907 an ordinance, valid or otherwise, passed by the City of Atlanta fixing street railroad fares, and if there existed at said time any such contracts or ordinances the same were invalid (a) because the City of Atlanta lacks the charter power to make any such contracts or ordinances, and (b) because if the City of Atlanta had charter power to make said contracts and enact said ordinances they would be void because they violate Article 4, Section 2, paragraph 1, of the Constitution of the State of Georgia,

137 conferring upon the General Assembly alone the power of regulating passenger tariffs, preventing unjust discrimination, and fixing reasonable and just rates.

(2) The claimed contracts between petitioner and the Towns of Edgewood and East Point are not valid contracts because (a) the said

Towns lack the charter power to make such contracts, and (b) because if the Towns of Edgewood and East Point had charter power to make said contracts they would be void because in violation of Article 4, Section 2, paragraph 1, of the Constitution of the State of Georgia, which restricts the power of regulating passenger tariffs and preventing discrimination to the General Assembly of this State, and (c) because under the words of the claimed contracts the fares in the two said towns are not fixed, but are to vary with the rates in the City of Atlanta, and the Commissioners in fixing rates in the City of Atlanta would lawfully automatically fix rates in the two said Towns.

(3) The claimed contracts in the Towns of Decatur and College Park are invalid (a) because each of said Towns lacks the charter power to make such contracts, and (b) because if said towns claimed the charter power to make said contract it is in violation of Article 4, Section 2, paragraph 1, of the Constitution of this State, which restricts to the General Assembly the power to make rates and prevent discrimination on railroads.

(4) Even if they are valid contracts as to one or more of the municipalities upon whose streets petitioner has lines, the existence of such valid contracts would not prevent the Railroad Commission from exercising its jurisdiction to fix street railroad fares of petitioner

in all cases other than cases covered by said valid contracts.

138 It is within the jurisdiction and the duty of the Commission to fix just and reasonable street railroad fares except in cases covered by valid existing laws and ordinances passed and enacted prior to 1907.

(5) If there are in the Cities whose streets are occupied by petitioner, valid existing contracts, the act of the Commissioners in fixing and approving just and reasonable rates would not, under the laws, be an impairment of such contracts. Under the Constitution of this State Article 4, Section 2, paragraph 1, the General Assembly alone can either by contract or laws, fix fares for street railway companies, and if cities having street railway corporations can contract with reference to fares, the above part of the Constitution enters into and becomes a part of such contracts, and such contracts, whether the Legislature acts directly or through Commissioners, are not impaired, but the provisions of such contracts, are, in fact, thereby carried out.

(6) The proviso in the Act of 1907 is void because in violation of the Constitution of the State of Georgia, set out in the Civil Code in Sections 6391 and 6358, in that it does not have uniform operation throughout the State, and is not impartial and complete as required by said Constitution.

54. Your petitioner shows that the refusal of the Railroad Commission to take jurisdiction of the petition of the Georgia Railway & Power Company, seeking to have the Commission to approve the street railway rates and fares attached to its petition, or to fix other

just and reasonable rates to be charged by your petitioner on its street railways, leaves petitioner remediless, unless this Honorable Court will grant the right of mandamus, directing the said Railroad Commission to take jurisdiction of the Georgia Railway & Power Company as to the matter of approving the said rates sought by it, or in lieu thereof in fixing other just rates.

139 55. The suggestion of the Commission that the City Councils of the cities claiming to have contracts modify the same and that upon such modification the Commission would then act and approve the six cents fare sought by petitioner has been rejected by the City Council of the City of Atlanta, as will be seen by a report of a committee to that body, and its resolution which is hereto the Council shown, marked "Exhibit P." Upon information and belief petitioner alleges that the other city councils will reject the suggestion of the Commission.

Wherefore, your petitioner names the Railroad Commission of Georgia, and C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry as defendants hereto, and respectfully prays:

(1) That this Court issue mandamus nisi, directed to the said Commissioners, C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry, requiring them to show cause at the time and place to be designated by the Court, not less than ten days nor more than thirty days, why a mandamus should not be issued against them and each of them, requiring them to take jurisdiction of the petition of Georgia Railway & Power Company, a copy of which is hereto attached, marked "Exhibit B," and to consider and adjudge the same, and to approve or disapprove, the street car fares therein sought, or in lieu thereof to fix such other fares and rates as may seem just and reasonable to said Railroad Commissioners, and in the exercise of its jurisdiction in said cause to 140 pass final judgment upon said petition in accordance with what may be equitable and just in the premises.

(2) That on the hearing of the mandamus that it be made absolute, and defendants be required to take jurisdiction of the petition of Georgia Railway & Power Company, a copy of which is hereto attached, marked "Exhibit B," and to consider and adjudge the same and to approve or disapprove the street car fares therein sought, or in lieu thereof to fix such other fares and rates as may seem just and reasonable to said Railroad Commissioners and in the exercise of its jurisdiction to pass final judgment upon said petition as to street railroad fares, in accordance with what may be equitable and just in the premises.

(3) That process may issue directed to said defendants requiring them to be and appear at the time and place designated by the Court to answer this complaint, and abide by the full orders of the court.

This the 22d day of August, 1919.

KING & SPALDING,  
C. T., L. C., & J. L. HOPKINS,  
BREWSTER, HOWELL & HEY-  
MAN,  
COLQUITT & CONYERS,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
*Plaintiffs' Attorneys.*

STATE OF GEORGIA,

*County of Fulton:*

Before the undersigned personally appeared Preston S. Arkwright, who upon oath says that he is the President of Georgia Railway & Power Company, the petitioner named in the foregoing 141 petition; that he has read said petition and knows the contents thereof; and that the facts therein are just and true as they stand stated.

PRESTON S. ARKWRIGHT.

Sworn to and subscribed before me this 23d day of August 1918.

[SEAL.]

L. D. HINTON,

*Notary Public, State at Large, Georgia.*

GEORGIA RAILWAY & POWER COMPANY

vs.

C. M. CANDLER et al.

Petition for Mandamus in the Superior Court of Fulton County, Georgia.

The petition of the plaintiff in the above entitled cause has been read and considered, and the same is hereby sanctioned and ordered filed, and defendants served, and it is further ordered that the defendants named, to wit: C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry be and appear before me at the Court House in the City of Atlanta, Georgia, on the 7th day of September, 1918, at nine and one half o'clock A. M., or as soon thereafter as can be heard, then and there to show cause why mandamus absolute should not be issued against them as prayed for in the petition.

Dated and signed this 23d day of August, 1918.

GEO. L. BELL,  
*Judge Superior Court Atlanta Circuit.*

142 STATE OF GEORGIA,  
*County of Fulton:*

GEORGIA RAILWAY & POWER COMPANY

vs.

C. M. CANDLER, GEORGE HILLYER, PAUL B. TRAMMELL, JOHN T. Boifeuillet, and J. A. Perry, Railroad Commissioners of the State of Georgia.

Petition for Mandamus in the Superior Court of Fulton County, Georgia.

To the Sheriff of said County, or a deputy:

The defendants are hereby required personally, or by attorney, to be and appear at the Superior Court to be held in Fulton County, Georgia, on the 7th day of September, 1918, then and there to answer the plaintiff's complaint to which this process is annexed, as in default thereof said Court shall proceed as to justice shall appertain.

Witness the Honorable George L. Bell, Judge of said Court, this 23 day of August, 1918.

S. T. CONYERS,  
*Deputy Clerk Superior Court, Fulton County.*

*Ordinance Allowing the Railway & Power Company, Atlanta Rapid Transit Company, Georgia Electric Light Company, and Atlanta Steam Company to Transfer Property and Franchises to Georgia Railway and Electric Company and Franchise Granted Georgia Railway and Electric Company.*

Consolidating Ordinance.

By Councilman Howell:

An ordinance to provide for the consolidation of the Atlanta Railway and Power Company, Atlanta Rapid Transit Company, Georgia Electric Light Company, and Atlanta Steam Company and for other purposes.

Section 1. The Mayor and General Council of the City of Atlanta do hereby ordain, that the authority, right, permission and consent are hereby granted to the Atlanta Railway and Power Company, Atlanta Rapid Transit Company, Georgia Electric Light Company and Atlanta Steam Company, and the successors and assigns of each, to consolidate, unite and merge the said companies, or any of them, and the properties, businesses, stations, lines, track, pipes,

cables, wires, conduits, rights, privileges, and franchises, or any part thereof, according to such plan at such time or times, and upon such terms as the companies entering into such consolidation may desire or deem to their best interest. In order to fully and effectually accomplish such consolidation, authority, power and consent are hereby granted to each of said companies, its successors and assigns to sell, dispose of, lease, assign, set over, transfer and convey all, or any part of its business, property, stations, lines, poles, pipes, 144 conduits, tracks, rights, privileges and franchises, and the said rights, privileges and franchises so assigned, set over, transferred or conveyed are hereby regranted and reconsent by the City of Atlanta, to the persons or company to which the same are assigned, transferred or conveyed, their and its heirs, successors and assigns, upon the same terms and conditions contained in said grants, except as the same may be herein modified.

Sec. 2. Be it further ordained, That the said consolidated company, its successors and assigns, shall have, and it and they are hereby granted the right, power, consent and permission to hold, enjoy, use, equip and operate the street railway lines, tracks, rights and privileges, so acquired upon the terms and conditions as to each of said lines contained in the grant under which the said line was constructed, the terms and conditions of each remaining the same as to the line constructed under it, except as such terms and conditions may be herein modified.

Sec. 3. Be it further ordained, That the said consolidated company, its successors and assigns, shall have, and it and they are hereby granted the right, power, consent and permission to hold, enjoy, use, equip and operate the electric light, heat and power conduits, ducts, wires, conductors, cables, insulators, manholes, service boxes, services, poles, appliances and connections, and the rights and privileges of the constituent companies so acquired by the consolidated company, upon the terms and conditions contained in the grants to the Georgia Electric Light Company, approved December 22, 1899, and those adopted April 6, 1892, and December 3, 1883, and all the terms and conditions contained in the electric light fran-

chise granted to the Atlanta Railway and Power Company 145 approved April 22, 1901, different from or not contained in the said grants to the Georgia Electric Light Company, be, and the same are, hereby repealed. And right and permission are hereby granted to said consolidated company, its successors and assigns, to open the streets, avenues, alleys and public places, or such of them as it or they may from time to time deem necessary or proper within the close or inner district of the fire limits of the City of Atlanta, and to lay, maintain and use therein conduits, duct, wires, conductors, cables, insulators, manholes, service boxes, services, and all necessary appliances and connections, and to use the streets alleys and public places as from time to time it may be deemed proper or necessary without the present inner fire limits for the erection and maintenance of poles and the stringing of wires, cables, insulators, and all necessary appliances and connections for the busi-

ness and purpose of conveying, using, conducting, supplying and distributing electricity for light, heat or power, for public or private use, upon the terms and conditions contained in said grants hereinbefore referred to as having been heretofore made to the Georgia Electric Light Company. And to re-enter upon such streets, alleys, avenues and public places from time to time as may be necessary for the extension, operation, repair and renewal of the same, or any portion thereof.

Sec. 4. Be it further ordained, That the Atlanta Railway and Power Company, its successors and assigns, are hereby relieved and released from completing the works, structures, and conduits required by the ordinance approved April 22, 1901, granting it an electric light franchise, and of all liability under said ordinance, and  
146 that the bond given under said ordinance is hereby cancelled, and the principal and surety thereon released and discharged from all liability.

Sec. 5. Be it further ordained, That the consolidated company, its successors and assigns, shall have, and it and they are hereby granted the right, power, consent and permission to hold, enjoy, use, equip, maintain and operate the steam pipes, branches, cut-offs, manhole, connections and appliances and the rights and privileges connected with the steam business and property so acquired, upon the same terms and conditions contained in the grant made to E. Woodruff and others, their successors and assigns, approved February 26, 1900, except the provisions requiring a payment to the city of a percentage or portion of the gross receipts of such business, which provision is hereby repealed.

Sec. 6. Be it further ordained, That the general ordinance, on the subject of street railways and their operation and control, approved August 22, 1899, and contained in the City Code, Section 1351-a to 1351-m, both inclusive, be and the same are, hereby repealed. It is also ordained and agreed that said consolidated company, its successors and assigns, shall be allowed to haul and convey freight and property upon and over its railways and lines in the city of Atlanta subject to such reasonable rules and regulations as may from time to time be adopted by the Mayor and General Council.

Sec. 7. Be it further ordained, That any and all provisions contained in any general ordinance of the city or in any section of the city Code, or in any of the grants or franchises heretofore made to or now owned by the Atlanta Railway and Power Company, the Atlanta Rapid Transit Company, the Georgia Electric Light Company  
147 or the Atlanta Steam Company, preventing or restricting a sale, transfer, disposition or assignment of any part of their property or franchises, or providing for any payment upon gross receipts, or forbidding, restricting, limiting or placing penalties upon consolidation, merger or sale of or by any of said companies, be, and the same are, hereby repealed.

Sec. 8. The City of Atlanta hereby reserves the right to condemn such portions of the lines of the street railways now held, owned and operated by the Atlanta Rapid Transit Company, whether then held and owned by the Atlanta Rapid Transit Company, its successors or assigns, or merged into the consolidated company, not exceeding five blocks at any one place, as may be necessary, in the judgment of the Mayor and General Council, for allowing other street car companies to enter the central portion of the city upon payment of just compensation to the railway company whose tracks are so condemned, whether held by the Rapid Transit Company or the consolidated company, its successors or assigns.

The City of Atlanta hereby further reserves the right to condemn such portions of the lines of street railway now held, owned and operated by the Atlanta Railway and Power Company, whether then held and owned by the Atlanta Railway and Power Company, its successors or assigns, or merged into the consolidated company, not exceeding five blocks, as may be necessary for the allowing of other street car companies to enter the central portion of the city, upon payment of just compensation to said company, its successors and assigns.

The City further reserves the right to allow other railway companies to pass over Whitehall Street viaduct and the tracks 148 constructed on said street and viaduct by the City, and in the event said City shall permit any other company to use said viaduct and tracks thereon, the same shall be upon the condition that the company so using shall be required to pay at least an equal amount to that required to be paid by the Collins Park and Belt Railroad Company or the equivalent of said sum in rental to the City of Atlanta or 5 per centum per annum on fifty thousand dollars. Said sums collected for the use of said viaduct to be paid to the City of Atlanta for its use.

The City further reserves the right as against the Atlanta Rapid Transit Company to allow other railway companies to pass over and use whatever rights, powers and tracks the Atlanta Rapid Transit Company has on Peachtree Street from Auburn Avenue south, and Whitehall Street from Alabama Street south, to Mitchell street, this use and purpose to be used by other such companies in order to reach Whitehall Street viaduct, such permission, however to preserve the said Atlanta Rapid Transit Company, its successors and assigns, the use of said viaduct and streets, as and for the period heretofore granted, so long as it complies with terms of grants held by them, and also to preserve said consolidated company the use of said viaduct herein granted and the rights to said streets heretofore granted to the Atlanta Railway and Power Company; such use, however, not to be exclusive. In the event said city shall permit any other company to use the rights, powers and tracks of the Atlanta Rapid Transit Company, the same shall be upon the condition that the company so using shall pay a proper sum for the use thereof, the amount to be fixed by the Mayor and General Council. This sum to be paid to the Atlanta Rapid Transit Company, its successors and assigns, for its and their use.

149 The reservation of the right to allow other companies to use the rights, powers and tracks of the Atlanta Rapid Transit Company on Peachtree Street from Auburn Avenue south and on Whitehall Street from Alabama Street south, to Mitchell Street, is without prejudice to the rights and interests which the Atlanta Railway & Power Company has in said tracks, whether such rights and interests are then held by the Atlanta Railway and Power Company, its successors or assigns or merged into the consolidated company, but as to such tracks the rights of each of said companies now owning or having an interest therein are to stand and be treated as they now are in the separate companies just as if they had not been consolidated, whether such rights are then held by said separate companies, or their successors or assigns or merged into the consolidated company.

It is intended hereby that the rights of condemnation herein reserved shall not be in addition to such rights as have been heretofore reserved in the separate franchise, but in lieu thereof.

Sec. 9. Be it further ordained, That said consolidated company shall have the right to operate its entire system and all of the cars across the Whitehall street viaduct as a part of its system without payment of any sum, should such consolidated company acquire the tracks and privileges of the Atlanta Rapid Transit Company the sum of \$50,000 heretofore paid by the Atlanta Rapid Transit Company for the privilege of operating cars across said viaduct being accepted as full payment for such privileges to said consolidated company, nor shall any additional sum be required to be paid by said consolidated company for the privilege of operating, upon or across any other bridge or viaduct in the city now built, other than the sum now being paid by the constituent company on such bridge, the payment now being required of the constituent company being in full for the privilege to the consolidated company.

Sec. 10. Be it further ordained, That said consolidated company and its successors and assigns, are hereby granted the right and permission to physically connect, merge and consolidate the said properties which it may acquire, wherever it desires, and to construct and lay such double tracks, curves, switches, connections, wire tracks, etc., as it may from time to time deem proper for this purpose, or for the purpose of rendering efficient service, and to straighten out the kinks in its tracks and lines, it being the intention hereof to allow the full and complete consolidation of the companies heretofore referred to and their properties whereby the free and possible use and profit thereof may result to said consolidated company and so that said company may consolidate, control and operate all of said properties as it may desire, subject only to proper police laws and restrictions.

Sec. 11. Be it further ordained, That the rights, privileges and grants herein contained are made for the consideration and upon the terms and conditions following to-wit:

(a) Said consolidated company shall within thirty days following the fact of such consolidation pay into the treasury of the City of Atlanta, the sum of \$50,000.

(b) Said consolidated company, its successors and assigns shall also be bound to pay on or before the first day of February of each year, beginning with the year 1903, into the treasury of the City of Atlanta, the following percentages upon the gross amounts received by said company, its successors and assigns, from all car fares and tolls for passengers and property, the sale or supply of electric current for light, heat and power, and the sale or supply of steam heat, whether such receipts be earned within or without the limits of the City of Atlanta, to-wit: for the first three years, beginning with 1902, one per cent (1) *per cent* per annum of said receipts for the following twenty years, beginning with the year 1905, 2 per cent per annum of said receipts; and thereafter, 3 per cent per annum of said receipts.

(c) The Mayor and General Council shall appoint or provide for a committee or board to make examination of the books and records of said company to ascertain the amount of its said gross receipts, and make report thereof — the General Council prior to February 1st, of each year; and said company shall also on or before the first day of February file a statement of said gross receipts sworn to by an officer of the company. Said statement and report shall cover the calendar year; that is from January 1st to December 31st, of the year preceding each February at which said reports and statements are made.

(d) The payment of percentage of gross receipts above provided for shall be in lieu of specific, occupation, license, excise, special franchise taxes not included in ad valorem taxes or charges by the City of Atlanta, and in full of all money demands, or charges whatever, except ad valorem taxes, paving charges as now provided by law, and bridge rentals, and whatever shall be at any time required or enacted on any of said accounts, or any account other than ad valorem taxes, paving charges and bridge rentals, shall operate to reduce to that extent the amounts due from the percentages above provided for.

(e) The said consolidated company shall, for the purpose of giving one continuous ride inside the City of Atlanta from a point on one of its lines to a point on another of its lines, which, however, does not carry the passenger on a parallel line *on* in the same general direction from which he came, grant one transfer ticket, on the payment of one full fare, provided such transfer is requested at the time of payment of the fare, provided the company shall have the right to make such reasonable rules and regulations as to limit the time in which they are used, so that they will be available only for the first connecting car, and as to any other matters necessary or proper to protect said company from imposition or abuse or assignment of such transfers, and to avoid

liability in damages from mistakes by employees in regard to said transfers.

Sec. 12. Be it further ordained, That the terms of this ordinance shall be accepted by said consolidated company upon its formation so as to bind it to the terms thereof, and the provisions of this ordinance shall not be effective until so accepted. It is further understood and intended hereby that whenever the name "Consolidated Company" is used herein it means that company into which the companies named above, or any two or more of them are consolidated, merged, or united, whether one of the existing companies or a new company; Provided, that no benefit hereunder and no repeal of any ordinance or part thereof made, hereby shall accrue or apply to any of said companies not included in said consolidated company, but as to any company which does not come into the consolidation provided for hereby, the city shall and does preserve all said ordinances and all powers and rights which the city now has or may hereafter acquire.

Sec. 13. Be it further ordained, That should the City of Atlanta ever at any time construct, lease, purchase, acquire, own, 153 hold, use or operate an electric lighting or power plant, then the percentages hereinbefore provided to be paid by said consolidated company shall abate as to the gross receipts derived from the business of supplying electric current and shall forever after be uncollectible, and the City of Atlanta shall from then on cease to be entitled to any percentages or other sums whatever, on account of the business of supplying electric current of said consolidated company, its successors and assigns.

Sec. 14. Be it further ordained, That all law, ordinances, resolutions, or parts thereof, as well as provisions in other grants and franchises, in conflict herewith, be, and the same are, hereby repealed.

Adopted January 27, 1902.

Concurred in January 29, 1902.

Approved February 8, 1902.

L. MIMS,  
*Mayor.*

#### *Amending Ordinance.*

By Councilman Howell:

Section 1. Be it ordained by the Mayor and General Council, That the ordinance approved February 8, 1902, entitled "An Ordinance to provide for the consolidation of the Atlanta Railway and Power Company, Atlanta Rapid Transit Company, Georgia Electric Light Company, and Atlanta Steam Company, and for other purposes," be and the same is hereby amended as follows:

1st. By striking in lines 6, 7 and 8 of Section 2, of said ordinance, the following words: "Was constructed, the terms and conditions of each remaining the same as to the lines constructed under it,"

154 and insert in lieu thereof the following words: "Is now held and operated."

2nd. By inserting in Section 10 of said ordinance, between the words "Lines" and "It," in the eighth line of said section, the following words: "The right to construct and lay tracks granted hereby is intended to be confined to the streets within the present system of the company, and is not intended to grant the right to construct new lines or build tracks upon streets or sections of streets not now occupied by street railways, without the further consent of the Mayor and General Council."

Sec. 2. Be it further ordained, That the said ordinance above referred to, as amended as above set out, be, and the same is hereby re-enacted.

Adopted February 8, 1902.

Concurred in February 8, 1902.

Approved February 8, 1902.

L. MIMS,  
*Mayor.*

*Acceptance of Ordinance by Georgia Railway and Electric Company.*

To the Mayor and General Council of the City of Atlanta:

In accordance with the provisions of Section 12 of the ordinance to provide for the consolidation of the Atlanta Railway and Power Company, Georgia Electric Light Company, Atlanta Rapid Transit Company and Atlanta Steam Company, and for other purposes, adopted by your honorable body and approved by the Mayor on February 8, 1902, Georgia Railway and Electric Company, a corporation duly organized under the laws of the State of Georgia, being the consolidated company referred to in said ordinance, into which two or more of the said constituent companies have been consolidated in accordance with the terms of said ordinance, 155 and into which it is contemplated by the officers of said company that all of said constituent companies named in said ordinance will be eventually merged, does hereby accept the terms of the said ordinance above referred to and also the terms of the amendment to said ordinance adopted by your honorable body on February 8, 1902, and also approved by the Mayor on February 8, 1902; and the said Georgia Railway and Electric Company does hereby agree and bind itself to the terms and provisions of the said ordinance as amended by the said amending ordinance above referred to.

Enclosed herewith is a certified check to the order of the City of Atlanta for the sum of fifty thousand (\$50,000) dollars, being the sum required to be paid by this company to the city by subdivision A of section 11 of the ordinance above referred to, as part of the consideration by this company to the City of Atlanta for the rights, consents and privileges conferred upon this company, its successors and assigns, by said ordinance.

Attached hereto are certified copies of the resolution of the stockholders and of the resolution of the Board of Directors of this company authorizing this acceptance to be made.

Witness the corporate name and corporate seal of the Georgia Railway and Electric Company hereunto affixed by P. S. Arkwright, its President, and S. J. Bradley, Secretary, hereunto duly authorized, this February 20, 1902.

GEORGIA RAILWAY AND ELECTRIC  
COMPANY,  
By P. S. ARKWRIGHT,  
*President.*

S. J. BRADLEY,  
*Secretary.*

To the Honorable Railroad Commission of the State of Georgia:

The petition of the Georgia Railway and Power Company respectfully shows:

1. That it is a corporation under the laws of the State of Georgia, and that its charter and history of its organization and the amount of the issue of its securities are all matters of record in the office of this Honorable Commission, and are here referred to for the purpose of this petition.
2. That petitioner is conducting the business of street car service to the public in the Cities of Atlanta, Kirkwood, Decatur, East Point, College Park and Hapeville; also in the City of Gainesville, Georgia; also extensive suburban street railway business in the counties of Fulton, De Kalb and Hall.
3. That it is also engaged in serving the public with electric current for light, heat and power in this same territory and generally throughout the northern part of the State of Georgia, embracing many other cities, towns, suburban territory, and serving a great number of industrial and commercial plants and private citizens.
4. That it is engaged in serving the public in the City of Decatur with gas, and that it owns the entire capital stock of the Atlanta Gas Light Company, which serves the cities of Atlanta, East Point, College Park and contiguous territory with illuminating and fuel gas.
5. That its electric current is generated largely by water power, and also to a considerable extent by steam plants, and that it has a distributing system and tower line which reaches from its plant at Tallulah Falls, and from the Cities of Elberton and Hartwell on the East to the cities of Newman, Carrollton and Cedartown on the West; Rome and Dalton on the North; Social Circle and Monroe on the South.

6. That in said territory it serves directly itself, or by furnishing municipalities and local companies, the electric current for forty-six cities and towns, and also serve a large number of mills, manufacturing plants and industries operating therein, and which use same both for light and power.

7. That embraced in said service is the furnishing of electric current for the pumping of water to various of the municipalities in said territory, and also for furnishing light and power to various public institutions, hospitals, United States Army Camps, cantonments, and to almost all of the public institutions located therein.

8. That it is furnishing electric current for power and light to a large number of cotton mills and other industrial plants of many and various kinds, which are engaged largely, and some of them exclusively, in furnishing materials to the National Government for the purpose of carrying on successfully the conduct of the war.

9. That your petitioner is confronted by a grave emergency arising out of the general conditions produced by the War, and which are affecting in a large measure the entire country and because thereof it is imperatively necessary that it have prompt and effective relief in order to enable it to continue its service of the public and the discharge of its duties generally under its charter and franchise.

10. That these conditions produced by the War have brought about an enormous increase in the cost of everything that goes to 158 produce the service that petitioner is rendering the public; that wages of its employees have been largely increased since 1916, and that as late as the first of April, 1918, a further increase was made, and petitioners can clearly see that it will be necessary to make other and additional increases in order to retain a sufficient force to operate its properties, and even with these increases it is exceedingly difficult to secure the employees necessary for operation. That the price of material of all kinds has tremendously increased, and the tendency still is to further increases, so that for every article it has to purchase it is paying war prices ranging from fifty to four hundred per cent. above the pre-war prices.

11. That taxes have largely increased, and the rates of interest on all moneys borrowed have largely increased.

12. That the entire output of petitioner's electric power is taken up and it cannot now enter into a contract to furnish any new enterprises or industries, or to supply any amount of current other than that already contracted until further development of its water powers takes place.

13. That in order to meet this situation and to have the company in position to supply the territory with additional electric current to take care of its growth and development and to meet the exigencies of the war, petitioner, early in the year 1917, perfected arrangements for the further development of its water powers in the terri-

tory around Tallulah Falls, and to this end perfected its financial arrangements and let the contracts and entered upon the said development. That this plan embraced the expenditure of 159 about Five Million (\$5,000,000.00) dollars, as shown by the records of your Honorable Commission, and of this sum said plan involved the furnishing of One Million, and Five Hundred Thousand (\$1,500,000.00) dollars by your petitioner from its earnings during the period of construction; that at the time of said contract that was a reasonable arrangement for your petitioner to make and it has good reason to contract for the furnishing of such sum from its income, but that shortly thereafter war conditions developed which render it impossible for petitioner to furnish the same from its receipts and revenues as now allowed to be charged by it on account of the large increases in cost as aforesaid.

14. That the said development, as shown by the records of your Honorable Commission, would very largely increase the capacity of petitioner to serve the public throughout said territory, and by means of such service to further the aims and purposes of the Nation in carrying on the War, and it is very desirable from every viewpoint that it should be allowed to make the same as being in the interest of the public. That it will be impossible for petitioner to make the said improvements and the same will have to be stopped unless the emergency that has arisen is relieved by an increase in its income that it has contracts for the machinery placed, as to some of which it has been forced to postpone the delivery on account of this emergency, thereby deferring the completion of said work for at least a year beyond the date originally contemplated.

15. That petitioner's rates are on file with this Honorable Commission, and the history thereof is disclosed by its records; that there has never been an increase of rates in any — petitioner's rate for electric lighting, for street car and suburban fares, or gas service, that all changes have been decreases.

160 16. That it is now required to grant transfers on all fares paid on its street car and suburban lines.

17. That said rates for the service of electric current and street car fares and gas now on file with this Honorable Commission are wholly inadequate and insufficient to furnish sufficient incomes to properly care for and preserve its properties and adequately and efficiently serve the public.

18. That the rates are so low as to be inadequate and insufficient to pay the costs of the service and yield a reasonable return on the investment necessary to render the said service.

19. That petitioner has never paid any dividend on either its common or second preferred stock; that it is in arrears on cumulative dividends due on its First Preferred Stock to the extent of Seventeen Per cent., and petitioner respectfully submits that it is entitled to charge sufficient rates and fares to enable it to pay a fair return upon its investment.

20. That a sound administration of petitioner's properties requires that a depreciation reserve should be set aside sufficient to fully replace the properties and maintain them and off-set all losses occurring from wear and tear, obsolescence and supercession, and other forms of depreciation; that its incomes are insufficient to enable it to pay the necessary expenses of operation, interest, charges, and taxes, and leave sufficient sum to cover this depreciation, much less pay any return upon the investment, or to its stockholders.

21. That it is directly and immediately in the interest of the public locally, and throughout the entire territory served by it, and to the National welfare, that petitioner be granted an increase in its rates in order to keep it a going concern and enable it to properly and effectively serve the public, and that petitioner is ready, and will disclose at the hearing, all facts, and give all information and details desired by the Honorable Commission.

22. The conditions confronting your petitioner are general throughout the United States and affect substantially all business and industries. Privately controlled business and individuals have met increased costs by increases in the prices of their products and services. It is essential that the prices charged by public utilities for their services must likewise be increased to meet the increased costs of material and labor. This has been recognized in many of the cities of the United States and by numbers of the State Public Utility Commissions and the local regulatory bodies. In many of the cities of the United States the rates for gas, electric service and street railway fares have already been increased, and applications are pending for increases in other cases. From the most complete information which your petitioner has been able to gather, there have recently been granted increases in four hundred and thirty (430) cases.

Within the past few months the critical situation confronting public utilities in the United States, brought on by abnormal war time conditions, was presented to the authorities in Washington. After a thorough investigation of the matter, the President of the United States, the Secretary of the Treasury, and the Comptroller of the Currency have all publicly expressed their concern as to the situation, and have urged in the interest of the National program for carrying on the War, that the State and local authorities take such steps as may be necessary to assist the utilities in preserving their credit and their services. Something more than the preservation of the 162 utilities is at stake. The services which in ordinary times were of local convenience have become in this period of stress a National necessity, and if the services of the public utilities throughout the country should stop, the whole war program would instantly collapse. It follows that in so far as the condition of the public utilities is impaired the War program of the United States is proportionately delayed and interfered with. What applies to the country as a whole in considering the public utilities as a whole applies likewise to the services rendered by your petitioner in the territory served by it in the City of Atlanta and the Northern Part of

the State of Georgia. As stated by the President of the United States: "It is essential that these utilities should be maintained at their maximum efficiency, and that everything reasonably possible should be done with that end in view."

23. Under the unusual war conditions which have prevailed for more than a year, the directors in charge of the property of your petitioner have earnestly, patiently and persistently endeavored to manage its affairs so as to enable your petitioner to furnish usual facilities at existing rates.

They realize that they can no longer effectively discharge the obligations of the Company, either to its owners or to the public, without a substantial decrease in the cost of labor and material, or a corresponding increase in the price for which its service may be sold.

Neither your Honorable Board nor your petitioner's Board of Directors can control the price of either material or labor, and the advanced cost of both these essential commodities makes the continued 163 conduct of your petitioner's business, as a going concern furnishing public service for reasonable compensation, impossible under the present scale of rates.

Your petitioner's directors have, therefore, formulated the table of rates attached to this petition as the only recourse that will enable the continued discharge of their responsibility to the public and to your petitioner as a public service corporation.

And your petitioner prays the approval of this Honorable Board to said table of rates so formulated in order that the same may become effective.

Respectfully submitted,

GEORGIA RAILWAY AND POWER COMPANY,

By — — — — —,  
*President.*

Atlanta, Georgia, April 15, 1918.

Georgia Railway and Power Company.

*Rates Within the City Limits of Atlanta, Georgia.*

In connection with all electric light, power and gas rates:

The customer himself to supply at his own cost the original installation of electric lamps and all renewals.

All gratuitous service to be dispensed with.

## Georgia Railway &amp; Power Company.

*Lighting Rates within the City Limits of Atlanta, Georgia, on Monthly Basis.*

## Residence Lighting Rates.

10c. per K. W. H. for the first 150 K. W. H. used per month, excess at 6c. per K. W. H.

Monthly minimum Guarantee \$1.11. All subject to 10% discount for prompt payment.

## Commercial Lighting Rates.

1 to	50—50 W. equiv.	150 K. W. H. at 10c. per K. W. H. ex.	
		6c. K. W. H.	
51 "	60	" "	175
61 "	70	" "	200
71 "	75	" "	225
76 "	85	" "	250
86 "	90	" "	275
91 "	100	" "	300
101 "	110	" "	325
111 "	125	" "	350
126 "	150	" "	400
151 "	175	" "	450
176 "	200	" "	500
201 "	225	" "	550
226 "	250	" "	600
251 "	300	" "	650
301 "	350	" "	700
351 "	400	" "	800
401 "	500	" "	900
501 "	600	" "	925 K. W. H. at 10c.; 925 K. W. H. at 6c.; ex. 4c. K. W. H.
601 "	700	" "	945
701 "	800	" "	965
801 "	900	" "	985
901 "	1,000	" "	1,000 Ditto.

Above 1,000-50 watt equivalent the rate is one K. W. H. per 50 watt equivalent at 10c. per K. W. H. One K. W. H. per 50 watt equivalent at 6c. per K. W. H. Excess at 3c. per K. W. H. Monthly minimum \$1.11. Regular minimum \$11.11 per 50 watt equivalent. Rate and minimum subject to 10% discount for prompt payment.

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## Georgia Railway and Power Company.

*Retail Power Rates Within the City Limits, Atlanta, Ga., on  
Monthly Basis.*

1 H. P. connected First	75 K. W. H. 6c. per K. W. H.; exc. 3c. pe		
2	130 K. W. H.		
3	185		
4	230		
5	275		
6	325	Ditto.	Ditto.
7	360		
8	400		
9	435		
10	465	Ditto; excess 2c. per K. W. H.	
12	500 K. W. H. 6c. per K. W. H.; exc. 2c. pe		
15	550 K. W. H.		
20	650		
25	700		
30	750		
35	800		
40	850		
50	925		
60	940		
70	955		
80	970		
90	985	Ditto.	Ditto.

Above 100 H. P. the primary and secondary K. W. H. per month are 10 cents per Hp. connected; the tertiary rate of \$1. 5c. per K. W. H. applies on all current used in excess of the primary and secondary K. W. H.

## Monthly Minimum Guarantee.

Smallest \$1.11.

Over 2 Hp. the guarantee is \$0.55 per H. P. connected.

Rate and minimum subject to 10% discount for prompt payment.

Georgia Railway & Power Company.

*Ceiling Fan Minimums.*

Atlanta, Ga.

Fans on power rates where no motors are used carry the following minimum per month.

1 fan	\$2.22	gross.
2 fans	3.33	"
3 "	3.88	"
4 "	4.44	"
5 "	5.00	"
6 "	5.55	"
7 "	6.11	"
8 "	6.66	"
9 "	7.22	"
10 "	7.77	"
11 "	8.33	"
12 "	8.88	"
166		
13 fans	9.44	gross.
14 "	9.99	"
15 "	10.55	"
16 "	11.11	" 11.81
17 "	12.22	
18 "	12.77	
19 "	13.20	

Less 10% discount for prompt payment.

Georgia Railway and Power Company.

*Residential, Cooking and Heating Rates.*

Georgia Railway and Power Company.

Residential Cooking and Heating Rate Within City Limits of Atlanta.

Monthly minimum, \$2.22.

K. W. hour rate, 5 cts. per K. W. hour.

Less 10% for prompt payment.

*Outside City Limits of Atlanta.*

Monthly Minimum, \$2.22.

K. W. hour Rate, 6 cts. per K. W. hour.

Less 10% for prompt payment.

(Use regular standard retain power application.)

Georgia Railway and Power Company.

Rates in Suburban Districts not Incorporated.

Georgia Railway and Power Company.

*Residence Lighting Rates in Suburban District, not Incorporated Just Outside of the City Limits of Atlanta, Ga.*

Within One-half Mile of Atlanta City Limits.

Primary rate, 10 cts. per K. W. Hour.

Monthly minimum, \$1.66.

Less 10% for prompt payment.

167 More Than One-half Mile of Atlanta City Limits.

Primary Rate, 10 cts. per K. W. Hour.

Monthly minimum, \$2.22.

Less 10% for prompt payment.

*Power Rates in Suburban Districts, Not Incorporated, Just Outside of the City Limits of Atlanta.*

Primary Power rate 7 cts. per K. W. Hour, gross.

Secondary Power Rate 3 cts. per K. W. Hour, gross.

K. W. Hours to apply to the various loads are the same at Atlanta schedule for retail power.

Monthly minimum, \$2.22.

Excess Minimum \$1.11 per H. P. connected.

All subject to 10% discount for prompt payment.

Use application form for light and power outside Atlanta.

Georgia Railway and Power Company.

*Commercial Lighting Rates in Suburban Districts, Not Incorporated Just Outside the City Limits of Atlanta.*

Within One-half Mile of Atlanta City Limits.

1	50	50 watt. eq. 150 K. W. H. at 10 cts.; excess 6 cts.	per	175	K. W. H.
51	60				
61	70			200	
71	75			225	
76	85			250	
86	90			275	
91	100			300	
101	110			325	Ditto. Ditto.

Minimum monthly minimum without half mile limit \$1.66.

Regular minimum \$11.11c. per 50 watt equivalent per month.

Discount of 10% on both rates and minimum for prompt payment.

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## More Than One-half Mile of Atlanta City Limits.

1	50	50 watt eq.	150 K. W. H. at 12c. per
51	60		175 K. W. H.
61	70		200
71	75		225
76	85		250
86	90		275
91	100		300
01	110		325

Minimum monthly minimum without half mile limit \$2.22.

Regular minimum \$11.11c. per 50 watt equivalent per month.

Discount of 10% on both rates and minimum for prompt payment.

Use application form for light and power outside Atlanta.

## Georgia Railway and Power Company.

Rates in Hartwell, Royston, Lavonia, Canon, Bowersville, Decatur, Kirkwood, East Lake, Carrollton, Gainesville,

*Lighting Rates in the Following Towns: Hartwell, Royston, Lavonia, Decatur, Kirkwood, East Lake, Carrollton, Gainesville, Bowersville, Canon.*

## Monthly Basis.

## Residence Lighting Rates.

10c. per K. W. H. for the first 150 K. W. H. per month, excess 6c. per K. W. H. Minimum monthly guarantee, \$1.11. All subject to 10% discount for prompt payment.

## Commercial Lighting Rate.

1	50	50 watt. eq.	150 K. W. H. at 10c. per K. W. H. excess.
51	60		175
61	70		200
71	75		225
76	85		250
86	90		275
91	100		300
01	110		325
11	125		350
26	150		400
51	175		450
76	200		500
01	225		550
26	250		600
51	300		650
01	350		700
51	450		800
51	500		900
			Ditto. Ditto.

Minimum monthly guarantee, \$1.11.

169      Monthly minimum \$11.11 gross per 50 watt equivalent  
 Rate and minimum subject to 10% discount for prompt  
 payment.

Georgia Railway & Power Company.

*Retail Power Rates in the Following Towns: Hartwell, Royston,  
 Lavonia, Decatur, Kirkwood, East Lake, Carrollton, Gainesville,  
 Bowersville, Canon.*

Monthly Basis.

H. P. connected, first	Excess
1	75 K. W. H. at 6c. per K. W. H.; 3c. per K. W. H.
2	130
3	185
4	230
5	275
6	320
7	360      Ditto.      Ditto.
8	400
9	435
10	465      2c. per K. W. H.
12	500
15	550
20	650
25	700
30	750
35	800
40	850
50	925

Monthly minimum guarantee, smallest \$2.22.

Over 2 H. P., the guarantee is \$1.11 per H. P., connected.

Rates and minimum subject to 10% discount for prompt payment.

## Georgia Railway and Power Company.

Rates in Hapeville, Clarkston, Ingleside, Stone Mountain, Duluth and Whitesburg.

## Georgia Railway and Power Company.

*Lighting Rates in the Following Towns: Hapeville, Clarkston, Ingleside, Stone Mountain, Duluth and Whitesburg.*

## On Month Basis.

## Residence Lighting Rates.

12c. per K. W. Hour for the first 150 K. W. Hours used per month, excess at 6c. per K. W. Hour.

Minimum monthly guarantee \$1.66.

All subject to 10% discount for prompt payment.

## Commercial Lighting Rates.

1 to 50 50 watt eq. 150 K. W. H. at 12c. K. W. H.; exc. 6c. K. W. H.

51 to 60	"	175		
61 to 70	"	200		
71 to 75	"	225		
76 to 85	"	250		
86 to 90	"	275		
91 to 100	"	300		
101 to 110	"	325	Ditto.	Ditto.
111 to 125	"	350		
126 to 150	"	400		
151 to 175	"	450		
176 to 200	"	500	"	"

Monthly minimum \$1.66. Regular minimum \$11.11c. per 50 watt equivalent. Rate and minimum subject to 10% discount for prompt payment.

## Georgia Railway and Power Company.

*Power Rates in the Following Towns: Hapeville, Clarkston, Ingleside, Stone Mountain, Duluth and Whitesburg.*

On Monthly Basis.

1 H. P. connected, first 75 K. W. H. 7c. per K. W. H.; exc. 3c. per

K. W. H.

2	130		
3	185		
4	230		
5	275		
6	320	Ditto.	Ditto.
7½	360		
8	400		
9	435		
10	465	" ; excess 2c. per K. W. H.	
12	500		
15	550		
20	650		
25	700		
30	750		
35	800		
40	850		
50	925		

Monthly minimum guarantee smallest \$2.22.

Over 2 H. P. the guarantee is \$1.11 per H. P. connected.

Rate and minimum subject to 10% discount for prompt payment.

171 Georgia Railway and Power Company.

*Ceiling Fan Minimums for the Following Towns: Hapeville, Ingle-side, Clarkston, Stone Mountain, Duluth and Whitesburg.*

Fans on power rates where no motors are used carry the following minimum per month:

1 fan .....	\$2.22	gross.
2 fans .....	3.33	
3 .....	3.88	
4 .....	4.44	
5 .....	5.00	
6 .....	5.55	
7 .....	6.11	
8 .....	6.66	
9 .....	7.22	
10 .....	7.77	
11 .....	8.33	
12 .....	8.88	
13 .....	9.44	
14 .....	9.99	
15 .....	10.55	
16 .....	11.11	
17 .....	11.81	
18 .....	12.22	
19 .....	12.77	
20 .....	13.20	

Less discount 10% for prompt payment.

Georgia Railway and Power Company.

Primary Hydro Electric Rates.

Georgia Railway and Power Company.

*Primary Hydro Electric Rates.*

38,000, 22,000, 11,000 Volt Service.

K. W.	M. D. monthly.	M. D. charge.	Plus K. W. hour charge
0	10	\$2.275 .....	3.13c.
11	20	2.275 .....	1.48c.
21	50	2.275 .....	1.19c.
51	100	2.164 .....	1.00c.
101	200	1.942 .....	.799c.
201	300	1.831 .....	.799c.
301	400	1.610 .....	.733c.
401	500	1.499 .....	.725c.
501	750	1.387 .....	.718c.
751	1,000	1.320 .....	.715c.
1001	1,250	1.276 .....	.713c.
1251	1,500	1.165 .....	.661c.
1501	2,000	1.010 .....	.637c.
2001	3,000	.954 .....	.611c.
3001	4,000	.888 .....	.594c.

All of the above rates are subject to a discount of 10% for prompt payment.

172 Georgia Railway and Power Company.

Municipal Hydro Electric Rates.

Georgia Railway and Power Company.

*Municipal Hydro Electric Rates.*

Service: 2,300 volts, three phase, 60 cycles.

K. W. demand.	K. W. hour charge.
1	10 at \$2.99 per K. W. M. D. plus.....
11	25 1.77 .....
26	50 1.77 .....
51	100 1.77 .....
101	151 1.77 .....
151 to 500 and above	1.77 .....

for the first 30,000 K. W. H. per month. Excess over 30,000 K. W. hour per month at .955¢.

501 and above 1.77 per K. W. M. D. plus 1.44¢ for the first 30,000 K. W. H. per month.

Excess over 30,000 K. W. H. per month at .955¢.

The above rates are subject to a discount of 10% for prompt payment.

Georgia Railway & Power Company.

*Secondary Hydro Electric Sales.*

Georgia Railway and Power Company.

*Secondary Hydro Electric Rates.*

38,000, 22,000, 11,000 Volt Service.

H. P. connected.	K. W. hour charge.	Yrly. guarantee.
50-150 .....	2.11¢	\$13.33
151-250 .....	1.22¢	11.11
Above 350 H. P. ....	1.11¢	8.88

Less 10% discount for prompt payment.

*Rural Services on Hydro Electric Lines.*

*Rural Service on H. E. Lines.*

Cotton Gins, Fertilizer Mixing Plants, and All Short Term Seasonal Business.

H. P. connected.	Basic amount.	Basic rate, K. W. H.	Rate per K. W. H. for excess of basic amt.	Minimum seasonal guarantee per H. P. connected.
7½ .....	380	7¢	3¢	\$10.00 net
10 .....	465	7	3	"
15 .....	550	7	3	"
20 .....	650	7	3	"
25 .....	700	7	3	"
30 .....	750	7	3	"
35 .....	800	7	3	"
40 .....	850	7	3	"
50 .....	925	7	2	9.00 net
60 .....	940	7	2	"
75 .....	960	7	2	"
80 .....	970	7	2	"
90 .....	965	7	2	"
100 .....	1,000	7	1,000 at 2¢ Excess 1½	8.00 net

Over 100 H. P. connected basic amount is 10 K. W. H. per H. P. connected at 7¢ 10 K. W. H. per H. P. connected at 2¢ all in excess of both amounts at 1½¢, subject to 10% discount for prompt payment. Short term business must be operative for at least four months

of each year. Should the customer desire service at any time during the period of temporary discontinuance, the Company will allow him to take electricity under the terms and conditions of said contract upon his notifying the Company of such desire, one week in advance and upon payment to the Company of the sum of \$10.00 for making temporary connection.

In the event of such temporary reconnection a Monthly Minimum Charge of \$1.66 gross per H. P. month shall be due and payable while the temporary Service is connected. Contract should be made for a term of five years. Company furnishes transformers, deliver 550 or 2,300 volts and builds 500 ft. of line free. Voltage 174 and line extension to be determined by local conditions.

#### Rural Service on Hydro Electric Lines.

Grist Mills, Saw Mills, Dairies, Pumps, etc., on 12-month business, same basic amounts, basic and secondary K. W. H. charges applied to Cotton Gins.

Monthly Minimum Guarantee \$1.11 per H. P. connected, monthly minimum to be less than \$11.11. Subject to 10% discount for prompt payment.

Any seasonal or short term business may be added to these contracts by having the Customer sign the short term addition to contract provided for this class of business.

Company will furnish transformers, deliver 550 or 2,300 volts and build 55 ft. line free, voltage and line extension to be determined by local conditions.

#### Georgia Railway and Power Company.

##### Gas Rates.

##### Decatur and Surrounding Territory.

##### Georgia Railway and Power Company.

##### Gas Rates.

##### Decatur and Surrounding Territory.

\$1.30 per M cu. ft. per month less 10¢ per M cu. ft. for prompt payment.

Monthly Minimum Charge 50¢ net.

All gratuitous services to be dispensed with.

##### Street and Suburban Railway Rates in Atlanta and Suburbs

The street railway fares to be increased one cent on each five cents charged under existing fares.

Transfers under present rules to be issued for a charge of two cents for each transfer ticket issued.

*Street Railway Rates in Gainesville, Georgia.*

Street railway fare to be straight six cents per passenger.

175

## EXHIBIT E.

Section 1. The General Assembly of the State of Georgia do enact, That from and after the passage of this Act George Hillyer, James L. Grant, B. D. Smith, J. B. Campbell, Eben Hillyer, John G. Westmoreland, J. J. Thrasher, J. J. Morrison, W. B. Cox, J. E. Bartlett, William Solomon, W. R. Webster, and such others as they may associate with them, and their successors and assigns be, and they are hereby declared a body politic and corporate by the name and style of the Atlanta Street Railroad Company, and in, and by that name may sue and be sued, plead and be impleaded in any Court of law or equity in this State, or where their rights may come in question, may have and use a common seal, and the same alter or destroy at pleasure, and purchase, accept, hold, enjoy or convey any property, real, personal, or mixed, that may be necessary for the purposes hereinafter set forth, or which they may acquire in the progress of their business.

Section II. That said Company shall have the exclusive power and authority to survey, lay out, construct and equip, use and employ street Railroads in the city of Atlanta, subject to the approval of the City Council thereof, for each route selected, first had and obtained, before the work thereon shall be commenced; the property of the said Company to be subject to the same State, County and City Taxes as the property of individuals in said city of like value is, or may be subject to, unless the City Council should, at any time, think fit to exempt the same, either in whole or in part, from the payment of city taxes, provided, that the rates of fare and freight upon said Railroad shall be subject to the approval of the Mayor and City Council of the City of Atlanta.

176 Sec. III. That the capital stock of said Company shall be one hundred and fifty thousand —, which may be increased to three hundred thousand dollars, should the business of the Company require it, books of subscription for which shall be opened in Atlanta, and at any other point or points which may be deemed advisable in the United States.

Sec. IV. That the officers of said Atlanta Street Railroad Company shall be a president, secretary, and five or more directors to be chosen at such time and in such manner as the corporators or a majority of them, may determine, and the said president and Board of Directors shall have full power and authority to establish all by-laws, rules and regulations for administering the affairs of said Company, and for carrying on the business, and to do all acts and to give all orders therein which may be necessary, and not inconsistent with the Constitution and laws of this State, or of the United States.

Sec. V. That the said Atlanta Street Railroad Company shall not employ any steam engine upon their lines without the consent of the City Council, who in granting the order allowing the same, shall prescribe the rules to be observed by said Company and by individuals to avoid injury to persons or property by the use of said engines.

Sec. VI. That the said Atlanta Street Railroad Company may extend any one or more of their lines of road in the County of Fulton over and beyond the corporate limits of said City, not more than one mile from the present corporate limits, should they see proper to do so, and in that event the damages to the owners of the strip or strips of land through which said road may run shall be ascertained and settled in the same manner as is prescribed by the

177 charter of the Central Railroad and Banking Company.

Sec. VII. That said Atlanta Street Railroad Company may convey upon their lines, either passengers or freight as the exigencies of the business community and public wants may require.

Approved 23 February, 1866.

#### EXHIBIT F.

Section I. Be it enacted by the General Assembly of the State of Georgia, That the Charter of the Atlanta Street Railroad Company incorporated by Act of the General Assembly of this State, approved February 23, 1866, be, and the same is, hereby extended and renewed for the period of thirty years from and after January 1st, 1896.

Sec. II. Be it further enacted, etc., That said Atlanta Street Railroad Company, as now incorporated, shall have power to purchase the railroads, and property of other street railroads in the city of Atlanta, or extending from the City of Atlanta into the counties of Fulton and De Kalb, and to operate the roads so purchased; provided, that nothing in this Act shall be construed to authorize said company to purchase, lease or otherwise obtain control of any other railroad, so as to defeat or lessen competition or create monopoly.

Sec. III. Be it further enacted, etc., That said Atlanta Street Railroad Company shall have power to hold, purchase, own, use, improve and embellish real estate to be used in connection with its railroad and as may be necessary for its legitimate street railway purpose under such reasonable rules and regulations as it may establish.

178 Sec. IV. Be it further enacted, etc., That said Atlanta Street Railroad Company shall have power to extend its line of roads to any point or points in the counties of Fulton and De Kalb but in making these extensions it shall not use or occupy any public road or highway without first obtaining permission of the Commissioners of Roads and Revenues of the county within which such public road or highway may be.

Sec. V. Be it further enacted, etc., That the said Atlanta Street Railroad Company shall have power to adopt and use any motive power adapted to its purposes, subject, in its use within the city of Atlanta, to such reasonable rules and regulations as the said city may establish, and, without the city of Atlanta, subject to such reasonable rules and regulations as the commissioners of Roads and Revenues may establish. And said corporation shall have power to increase its capital stock to a sum not exceeding one million of dollars, and it shall have power to issue its bonds for corporate purposes, and to secure the same by mortgage or trust deed in its property; provided, that nothing in this Act contained shall have the effect or be construed as extending to any railroad, or lines of road or appurtenances, which said Atlanta Street Railroad Company may purchase under the authority of this Act, any exemption from taxation of any kind; and provided, also, that nothing in this Act contained shall have the effect of any wise extending, enlarging or continuing any exemption from taxation of any kind in favor of said Atlanta Street Railroad Company other than may already exist in favor of said company, or of saving or reserving to said Atlanta Street Railroad Company any right of exemption from taxation which, under the law, said Company would or might be deprived of 179 by this amendment under the laws of this State.

Sec. VI. Be it further enacted, that all laws and parts of laws in conflict with this Act be, and the same are, hereby repealed.

Approved December 26, 1890.

#### EXHIBIT G.

#### *Charter of Atlanta Consolidated Street Railway Company.*

State of Georgia.

By His Excellency W. J. Northern, Governor and Commander-in-Chief of the Army and Navy of this State and the Militia thereof, to all to whom these presents may come, Greeting:

Whereas, Joel Hurt, William H. Patterson, Henry A. Inman, Dana R. Bullen, G. L. Thompson and Walter S. Garfield all of the City of Atlanta, County of Fulton, and State of Georgia; Norwood Robson, of Kirkwood, De Kalb County, Georgia; H. E. W. Palmer of Edgewood, Fulton County, Georgia; Alfred A. Glasier and James F. A. Clark of the City of Boston, County of Suffolk, State of Massachusetts, Charles A. Coffin of Lynn, County Essex, and State of Massachusetts, have filed in the office of the Secretary of State certain Articles of Association with a view of forming a corporation, to be known as "Atlanta Consolidated Street Railway Company," and with a capital of two million dollars (\$2,000,000) for the purpose of constructing, maintaining and operating a railroad, to wit: A system of street and suburban railroads for public use in the conveyance of persons and property in the counties of Fulton, De Kalb

and Cobb, in Georgia, through the various streets of Atlanta, Georgia, and from Atlanta to Decatur, and through and over the streets of Decatur, and from Atlanta to and through West End to West View Cemetery and on, over and along the streets of said Atlanta, Decatur, and West End, and to such localities in said counties of Fulton, De Kalb and Cobb as may be convenient or expedient, and returning to Atlanta (provided that where the streets of any city or town and roads of said counties are occupied, consent must first be obtained from the proper authorities), and, in addition thereto, to use and maintain and operate its cars and other rolling stock, on, over and upon such tracks already built of other railroad companies which it may purchase, lease or otherwise lawfully own or control, and over all rights of way it may obtain from time to time and have complied with the statutes in such cases made and provided;

Therefore, the State of Georgia hereby grants unto the above named persons, their successors and assigns, full authority by and under the said name of Atlanta Consolidated Street Railway Company, to exercise the powers and privileges of a corporation for the purpose above stated and in accordance with the said Articles of Association and the laws of this State.

In Witness whereof, These presents have been signed by the Governor and attested by the Secretary of State of the State of Georgia, at Atlanta, and the great seal of the State of Georgia attached thereto, this sixteenth day of May, 1891.

W. J. NORTHERN,  
*Governor.*

By the Governor:  
PHILIP COOK,  
*Secretary of State.*

*Atlanta Consolidated Street Railway Company Changes its Name to Atlanta Railway and Power Company.*

To all to whom these presents may come, Greeting:

181      Whereas, The Atlanta Consolidated Street Railway Company, a corporation created and existing under the laws of this State, has filed in this office in terms of the law, a petition asking that its Charter be amended by changing its corporate name from Atlanta Consolidated Street Railway Company to Atlanta Railway and Power Company, and has complied with all the requirements of the law in such cases made and provided; therefore, the State of Georgia hereby amends the Charter of the said Atlanta Consolidated Street Railway Company by changing its corporate name from Atlanta Consolidated Street Railway Company to Atlanta Railway and Power Company.

In witness whereof, These presents have been signed by the Secretary of State, and the great seal has been attached hereto, at the Capitol, in Atlanta, on this first day of July, 1899.

(Signed)

PHILLIP COOK,  
*Secretary of State of Georgia.*

(Seal attached.)

**"EXHIBIT H."***Charter of Georgia Railway and Electric Co.*

State of Georgia.

Office of Secretary of State,

Atlanta, Ga.

To all to whom these presents may come, Greeting:

Whereas, in pursuance of an Act of the General Assembly of the State of Georgia, approved December 17, 1892, and Acts amendatory thereof, H. M. Atkinson, P. S. Arkwright, R. E. Cullinane, S. J. Bradley, M. B. Lipscomb, F. M. Sisk, G. W. Brine, J. G. Rossman, J. R. Hunter and W. B. Stovall, all of Atlanta, Fulton County,

Georgia, having filed in the office of the Secretary of State, 182 a certain petition seeking the formation of a corporation to be known as Georgia Railway and Electric Company, with its principal office in Atlanta, Georgia, with a capital stock of three million dollars (\$3,000,000) of which at least three hundred thousand dollars may be preferred stock, with the right to increase either common or preferred stock, or both, as provided by law, for the purpose of purchasing, owning, constructing, equipping, maintaining and operating a street and suburban railroad within the City of Atlanta, Georgia, and to and from said city to divers points within the Counties of Fulton and De Kalb, in said State (with the right hereafter to extend according to law, its lines, as stated in the petition for incorporation), along the routes indicated in the application for this certificate, a copy of which said application is hereto attached and made a part hereof; said corporation to be chartered for the term of one hundred and one years and to have, exercise, and enjoy all the rights, powers and privileges incident to corporations of such character under the laws of this State; especially the powers and privileges of transporting persons and property over its streets and suburban lines, and to charge for the carriage thereof; and also to purchase and own, build, maintain and operate electric light and power plants, and to furnish and sell electric light and electric power, and having complied with the statutes in such cases made and provided.

Therefore, the State of Georgia hereby grants unto the above named persons, their successors and assigns, full authority by and under the said name of Georgia Railway and Electric Company to

183 exercise the powers and privileges of a corporation for the purpose above stated, subject to the provisions of Article Four

(4) of the Constitution of this State, and all the laws governing railroad companies of force at the date of this certificate, or that may hereafter become of force, either by constitutional or statute law, or by any rules and regulations of the Railroad Commission

of this State, or otherwise, which govern and control the operation of railroads in this State.

In witness whereof, These presents have been signed by the Secretary of State and to which is annexed the great seal of the State, at Atlanta, Georgia, this twenty-eighth day of January, 1902.

PHILLIP COOK,  
Secretary of State.

*First Amendment to Charter of Georgia Railway and Electric Company.*

State of Georgia.

Office of Secretary of State,  
Atlanta.

To all to whom these presents may come, Greeting:

Whereas, in pursuance of an Act of the General Assembly of the State of Georgia, approved December 17, 1892, and Acts amendatory thereof, Georgia Railway and Electric Company having filed in this office a certain petition asking that its charter be amended as to authorize an increase of its capital stock, and having complied with the statutes in such cases made and provided:

Therefore, The State of Georgia hereby amends the Charter of said Georgia Railway and Electric Company, as follows. to-wit:

The capital stock of said corporation is increased from the sum of \$3,00,000 to the sum of six million, eight hundred thousand (\$6,800,000) Dollars, consisting of \$5,000,000 of common stock and \$1,800,000 of preferred stock.

184 The said railway company to exercise the powers and privileges hereby conferred, subject to Article Four (4) of the Constitution of this State, and all laws governing railroad companies, at the date hereof, or that may hereafter become of force either by constitutional or statute law, or by any rules or regulation of the Railroad Commission of this State, or otherwise, which govern and control the operation of railroads in this State.

In witness whereof, These presents have been signed by the Secretary of State of the State of Georgia, at the Capitol, in Atlanta and the great seal of the State attached hereto, this twenty sixth day of September, 1902.

PHILLIP COOK,  
Secretary of State.

*Second Amendment of Charter of Georgia Railway and Electric Company.*

State of Georgia.

Office of Secretary of State,  
Atlanta.

To all to whom these presents may come, Greeting:

Whereas, in pursuance of an Act of the General Assembly of the State of Georgia, approved December 17, 1892, and Acts amendatory thereof, Georgia Railway and Electric Company having filed in this office a certain petition asking that its charter be amended so as to authorize an increase of its capital stock, and having complied with the statutes in such cases made and provided:

Therefore, The State of Georgia hereby amends the charter of said Georgia Railway and Electric Company as follows: to-wit: So as to increase the capital stock of said corporation, from the sum of six million, eight hundred thousand (\$6,800,000) dollars, to the sum of eight million, four hundred and fourteen thousand, six hundred (\$8,414,600) dollars, consisting of \$2,400,000 preferred stock and \$6,014,600 common stock.

185 The said railroad company to exercise the powers and privileges herein conferred, subject to Article Four (4) of the Constitution of this State, and all the laws governing railroad companies at the date hereof, or that may hereafter become of force, either by constitutional or statute law, or by any rules or regulations of the Railroad Commission operation of railroads in this State.

In witness whereof, These presents have been signed by the Secretary of State of the State of Georgia, at the Capitol in Atlanta, and the great seal of the State attached hereto, this eighth day of July, 1903.

PHILLIP COOK,  
*Secretary of State.*

*Third Amendment to Charter of Georgia Railway and Electric Company.*

State of Georgia.

Office of Secretary of State,  
Atlanta.

To whom it may concern, Greeting:

Georgia Railway and Electric Company, a corporation chartered by the Secretary of State of Georgia, January 28, 1902, and amended under the General Law, September 26, 1902, and July 8, 1903, re-

spectively, having petitioned for an amendment of the Charter of said corporation in terms of the law in such cases made and provided, the corporate powers and privileges set out in the provisions of Division 4 of Section 1 of Article 6 of Chapter 2 of the Code of Georgia, 1895, and particularly the provisions contained in Sections 2181, 2182 and 2183 of said Code, providing for the grant of corporate powers and privileges by the Secretary of State to street railroad companies are hereby conferred upon Georgia Railway and Electric Company.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office, at the Capitol, in Atlanta, this sixteenth  
186 day of October, One Thousand Nine Hundred and Three  
and of the Independence of the United States of America  
the One Hundred and twenty eighth.

[SEAL.]

PHILLIP COOK,  
*Secretary of State.*

“EXHIBIT I.”

*Deed from Atlanta Street Railroad Company to Atlanta Consolidated Street Railway Company.*

Deed Book C-4, Page 669, Fulton County Records.

GEORGIA,  
*Fulton County:*

This indenture, made and entered into this the twenty-first day of September 1891, between the Atlanta Street Railroad Company of the one part, and the Atlanta Consolidated Street Railway Company of the other part, (both being corporations under the laws of the State of Georgia, and having their respective offices and place of business in Atlanta, in said County);

Witnesseth: That whereas said party of the first part (hereinafter called the Atlanta Company), did on the fifteenth day of September 1891, at a meeting of its stockholders wherein all of its stock was represented, by a unanimous vote, pass a resolution as follows:

“Whereas, The several Stockholders of this Company are interested in the development and extension of the business and lines of the Atlanta Consolidated Street Railway Company, a corporation established under the laws of the State of Georgia, and having its principal place of business at Atlanta, in said State (hereinafter called the Consolidated Company):

187 “And Whereas, The Consolidated Company desires to acquire all the real estate, road bed, tracks, rolling stock, equipments and property of every kind and description, owned by the Company, including all its contracts, choses-in-action, rights, privileges and franchises;

“And whereas, By reason of their interest in said Consolidated Company, said several stockholders are willing that all of the Com-

pany's property should be so acquired by the Consolidated Company, and hereafter owned and enjoyed by it, in consideration of the assumption by the Consolidated Company of all such indebtedness as may be owing by this Company—

Now, then, in consideration of the premises, and of the expectation on the part of said several stockholders of being benefitted as stockholders of the Consolidated Company, or as parties otherwise interested in its business, by that Company's acquiring and holding to its own use said property, rights, franchises, etc. of this Company, it is voted that the Directors of this Company be, and are, hereby authorized and directed, in its name and behalf, to cause to be executed and delivered, proper and sufficient deeds, and any other suitable instruments of writing, conveying and transferring to the Consolidated Company, for its sole use and benefit, in consideration of the assumption of its debts, as previously provided, all the real estate, road bed, tracks, rolling stock, equipments and property of every kind and description, owned by this company, now or at the time the conveyance or transfers are made, including all its contracts, choses-in-action, rights, privileges and franchises. The Consolidated Company shall, however, as a part of the transaction by which it acquires said property, franchises, etc. execute and deliver to the said Atlanta Street Railroad Company an agreement in writing to assume and pay all its indebtedness."

188 And whereas, Afterwards, to-wit: on said fifteenth day of September, the Board of Directors of said Atlanta Company did meet and resolve as follows:

"Whereas, At a special meeting of the stockholders of this Company, held on the fifteenth day of September, 1891, at which every stockholder of the Company was present in person or by proxy, a vote, whereof the following is a copy was unanimously adopted, viz:

"Whereas, The several stockholders of this Company are interested in the development and extension of the business and lines of the Atlanta Consolidated Street Railway Company, a corporation established under the laws of the State of Georgia, and having its principal place of business at Atlanta, in said State (hereinafter called the Consolidated Company).

"And whereas, The Consolidated Company desires to acquire all the real estate, road bed, tracks, rolling stock, equipment and property of every kind and description, owned by this Company, including all its contracts, choses-in-action, rights, privileges and franchises;

"And whereas, By reason of their interest in said Consolidated Company, said several stockholders are willing that all of the Company's property should be so acquired by the Consolidated Company, and hereafter owned and enjoyed by it, in consideration of the assumption by the Consolidated Company in all such indebtedness as may be owing by this company.

"Now then, in consideration of the premises, and of the expectation on the part of said several stockholders of being benefitted as

stockholders of the Consolidated Company, or as parties otherwise interested in its business by that Company's acquiring and holding to its own use said property, rights, franchises, etc. of the 189 Company, it is voted that the Directors of this Company be and are, hereby authorized and directed, in its name and behalf, to cause to be executed and delivered property and sufficient deeds and any other suitable instruments in writing, conveying and transferring to the Consolidated Company for its sole use and benefit in consideration of the assumption of its debts, as previously provided, all the real estate, road bed, tracks, rolling stock, equipment and property of every kind and description, owned by this Company, now or at the time the conveyance or transfers are made, including all its contracts, choses-in-action, rights, privileges, and franchises. The Consolidated Company shall, however, as a part of the transaction by which it acquires said property, franchises etc., execute and deliver to the Atlanta Street Railroad Company an agreement in writing to assume and pay for all its indebtedness."

"Now then, It is voted that the President and Treasurer of the Company are hereby authorized and directed in its name and behalf to make, execute and deliver to the Atlanta Consolidated Street Railway Company proper deeds and any other instruments for carrying out the purpose of said vote adopted by the stockholders;

"Voted further, That the President and Treasurer obtain from said Consolidated Company an agreement in writing to assume and pay all the indebtedness of this Company."

Now, Pursuant to said action of said stockholders and Directors for and in consideration of the sum of five (\$5.00) dollars to the said Atlanta Company by said Atlanta Consolidated Street Railroad Company (hereinafter called the Consolidated Company), in hand paid, at and before the delivery of these presents, the receipt whereof is hereby acknowledged, as well as in consideration of the 190 undertaking of said Consolidated Company to assume and pay all the indebtedness of said Atlanta Company, to it delivered simultaneously with the delivery of these presents; the said Atlanta Company has bargained and sold, and does hereby sell and convey unto said Consolidated Company, its heirs, and assigns, and successors all the real estate, road bed, tracks, rolling stock, equipments and property of every kind and description, now owned by the said Atlanta Company, including all its contracts, choses-in-action, rights, privileges and franchises.

And which railroads are more fully described as follows:

#### Route of the Atlanta Street Railroad.

On Peachtree Street, from Wall Street, north throughout the City to Wilson Avenue, then on Wilson Avenue to Piedmont Park. Also on Ponce de Leon Avenue, from Peachtree Street to Ponce de Leon Springs. Also, on Marietta Street, from Peachtree Street to the city limits and beyond to Howell's Mill road, opposite the Exposition Mills. On Decatur Street, from Peachtree street to Daniel Street

on Edgewood Avenue, from Peachtree street to Pryor Street. On road Street, from Marietta Street to Alabama Street, Alabama street to Whitehall Street, Whitehall street to a point near the city limits, thence across the Company's right of way and under the Central Railroad to Peters street; along Peters street to Park street, along Park to Lee, along Lee to Gordon, and along Gordon street to the western limits of West End. Also on Hunter street to the western limits of West End. Also on Hunter street from Broad to Whitehall. Also on Alabama street from Whitehall to Loyd, along Loyd to Waverly place, along Waverly place to Washington, along Washington to Jones, along Jones to Capitol Avenue, and along 91 Capitol avenue to Bass street.

To have and to hold, the said rights, things and premises, with all and singular the rights, members and appurtenances thereof to the same being or belonging or in anywise appertaining, to the only proper use, benefit and behoof of the said Consolidated Company, its heirs, assigns and successors, forever, in fee simple.

And the said Atlanta Company, for itself, (its heirs) and legal representatives, the said rights, things and premises and appurtenances unto the said Consolidated Company, its heirs, assigns, and successors, against the said Atlanta Company, its heirs, assigns and legal representatives, and all and every other person or persons whatever, shall and will warrant and forever defend, by virtue of these presents.

In witness whereof, the said Atlanta Company has caused its name and its seal to be hereunto signed and put, pursuant to said resolution, by its President H. E. W. Palmer, and its Treasurer, Alfred A. Glasier, the day and year first above written.

THE ATLANTA STREET RAILROAD  
COMPANY,

[SEAL.] By H. E. W. PALMER,  
*President.*

ALFRED A. GLASIER,  
*Treasurer.*

Signed, sealed and delivered in the presence of  
T. A. HAMMOND, JR. [SEAL.]  
W. A. SPENCER,  
*Notary Public, Fulton County, Georgia.*

Signed, sealed and delivered by Alfred A. Glasier, Treasurer, in presence of

ROBERT T. CLAPP.  
CHAS. HALL ADAMS,  
*Commissioner of Deeds for the State of  
Georgia, in the State of Massachusetts.*

STATE OF MASSACHUSETTS,  
*County of Suffolk,*  
*City of Boston, ss:*

I, Charles Hall Adams, Commissioner of Deeds in said  
 192 State of Massachusetts, for the State of Georgia, do certify  
 that A. A. Glasier, whose signature I above attested, is to me  
 personally known, and he did sign deed in presence of myself and  
 R. P. Clapp, the other attesting witness, for the purposes in said deed  
 set forth, this twenty sixth day of September A. D., 1891.

(Signed)  
 [SEAL.]

CHARLES HALL ADAMS,  
*Commissioner of Deeds for the State of*  
*Georgia in the State of Massachusetts.*

*Deed of Atlanta Railway and Power Company to Georgia Railway  
 and Electric Company.*

Deed Book 160, Page 181, Fulton County Records.

STATE OF GEORGIA,  
*Fulton County:*

This indenture, made this twentieth day of February A. D., 1902,  
 by and between Atlanta Railway and Power Company, a corporation  
 under the laws of the State of Georgia, having its principal place of  
 business in the City of Atlanta, said Fulton County, Georgia, party  
 of the first part, and Georgia Railway and Electric Company, a  
 corporation duly incorporated, organized and existing under and  
 by virtue of the laws of the State of Georgia, having its principal  
 place of business in the City of Atlanta, said Fulton County, Georgia,  
 party of the second part,

Witnesseth, That the said party of the first part, for and in con-  
 sideration of the sum of ten thousand dollars (\$10,000.00) and other  
 valuable considerations to it in hand paid by the said party  
 193 of the second part at and before the sealing and delivery of  
 these presents, the receipt of which is hereby acknowledged,  
 has granted, bargained, sold, assigned, transferred, aliened, conveyed,  
 released and confirmed, and by these presents does grant, bargain,  
 sell, assign, transfer, alien, convey and release and confirm unto the  
 said party of the second part, its successors and assigns, all the prop-  
 erty, real, personal and mixed, of any kind whatsoever of said party  
 of the first part, together with all its electric lighting and street and  
 suburban railway plants and properties, all of its real estate, build-  
 ings, improvements and fixtures, all of its road bed, rights of way,  
 tracks, rails, sidings, turnouts, rolling stock, equipment, motors cars,  
 bridges, and right in, on or over bridges, culverts, piers, depots,  
 grounds, stations, workshops, steam plant, electric plant, machinery,  
 engines, piping, boilers, dynamos, electric machinery, motors, wires,  
 poles, lines, appliances, fixtures, apparatus lamps, conduits, ducts,  
 tubes, subways, cables, manholes, fuel, supplies, office furniture, fix-

tures, tools, wagons, live stock, contracts, rights, privileges, easements and franchises, and all other of its property of whatever description and wheresoever situated, together with all and singular the rights, privileges and appurtenances thereto belonging or in anywise appertaining, and all things in action, contracts, claims, demands, business and good will of the said party of the first part, as well as in equity, together with all the rights, tolls, issues, incomes, privileges and franchises growing out of or pertaining to said property, and all rights, interest, profits, easements and franchises of the said party of the first part, with full power to the party of the second part, its successors and assigns, to succeed to and enjoy all the rights, 194 privileges, immunities and franchises now held or exercised by the said party of the first part.

There are included, among other things, in the property hereby conveyed, the following described property, to wit:

1. The following lines of railway, situated in the City of Atlanta and its vicinity, and in the counties of Fulton and De Kalb, and in various municipalities in each of said counties, in the State of Georgia, namely:

On Marietta street from Peachtree Street to a point near Van Winkle's post office; on Decatur street from Peachtree Street to Cornelia Street; on Broad Street from Peachtree street to Mitchell street; on Mitchell street from Broad street to Davis street; on Madison Avenue from Mitchell street to Nelson Street; on Nelson street from Madison avenue to Nelson Street; on Nelson street from Madison avenue to Tattnall street; on Walker street from Nelson Street to Peters street; on Peters street from Walker street to Leonard Street; from Peters street to Ella street; on Ella street from Leonard street to West End Avenue; on West End Avenue from Ella street to Ashby street; and Ashby street from West End avenue to Lucile Avenue; on Lucile avenue from Ashby street to Gordon Street; on Gordon Street from Lucile Avenue to entrance of West View Cemetery; on Edgewood avenue from Peachtree street to Hurt street; on north Boulevard from Edgewood avenue to Southern Railway; on Jackson street from Edgewood avenue to Ponce de Leon avenue; on Exchange place from Edgewood avenue to Ivy street; on Tattnall street from Nelson street to West Hunter street; on West Hunter street from Tattnall street to city limits; on north Pryor street from Edgewood avenue to Peachtree street; on Houston street from Peachtree Street to Hilliard street; on Hilliard street from Houston street to Highland avenue; on Highland avenue from Hilliard street to

195 Virginia avenue; on Virginia avenue from Highland avenue to Boulevard; on Hurt street from Decatur road to Euclid avenue; on Euclid avenue from Elizabeth street to Moreland Avenue, and on Moreland avenue about a half mile north from Euclid Avenue; on Elizabeth street from Euclid avenue to Edgewood Avenue; on Decatur road from Hurt street to Moreland avenue; on Alabama street from Broad street to Central avenue; on Whitehall street from Alabama street to alley-way leading under

Central and Atlanta and West Point Railroads; along said alley-way from Whitehall Street to Peters street; along Peters street to Park street; along Park street to Lee Street; on Lee street from Park street to East Point road; thence along East Point road through towns of Oakland City and McPherson to town of East Point, about six miles distant from city; on Gordon Street from Lee street to Holderness street; on Smith street from Whitehall street on Glenn Street; on Hunter street from Broad street to Whitehall street; on Luckie street from Broad street to Spring street; on Spring street from Luckie street to Powers street or West Peachtree Place; on Powers street from Spring street to West Peachtree street; on West Peachtree street from Baker Street to Sixth Street; on Mitchell Street from Broad street to Capitol avenue; on Capitol avenue from Mitchell street to Bass street; on Grant street from Decatur street to East Fair street; on Central avenue from Alabama street to Pulliam street; on Pulliam street from Central avenue to Clark street; on Clark street from Pulliam street to Washington street; on Waverly Place from Central avenue to Washington street; on Washington Street from Waverly Place to Ormond street; on Trinity avenue from Washington Street to East Fair street; on East Fair street from Trinity Avenue to Pearl street; on Pearl street through private right of way,

196 to county of De Kalb at Dahlgreen's Station; thence further along said private right of way and through county of De

Kalb to a point opposite Agnes Scott Institute, in town of Decatur, about seven miles distant, from center of city; on Park avenue from East Fair Street to Berne street; on Berne street from Park avenue to South Boulevard; on South Boulevard to a point about two hundred feet south of Berne street; on Fraser street from East Fair street to East Hunter street; on East Hunter street from Fraser street to South Pryor Street; on south Pryor Street, from Alabama street to Ridge Avenue; from south Pryor street, along Ridge avenue and McDonough road, to a point opposite Federal Prison; on Georgia avenue from South Pryor street to Cherokee avenue; on Cherokee avenue from Georgia Avenue to Ormond street; on Peachtree street from Marietta street to Southern Railway bridge at Brookwood; on Ponce de Leon avenue from Peachtree street to Southern Railway; on Linden street from Peachtree street to West Peachtree street; on Tenth street from Peachtree street to Piedmont avenue; on Fourteenth street from Peachtree street to Piedmont avenue; on Jones avenue from Marietta street to Gray Street; on Gray street from Jones Avenue to Simpson Street; on Simpson street from Gray street to Walnut street; on Courtland street from Houston Street to Pine street; on Pine street from Courtland street to Angier Avenue; on Angier Avenue from Pine street to North Boulevard; on Piedmont avenue from Pine street to Fourteenth street; on Forsyth street from Church street to West Fair Street; on West Fair Street from Forsyth street to Cooper street; on Cooper street from Fair street to Hendrix avenue; on Hendrix avenue from Cooper street to south Pryor Street; on Ormond Street from South Pryor street to Cherokee avenue; on Richardson street from Cooper street to McDaniel street; on McDaniel Street through

out its length and over private right of way and several country roads to Fort McPherson, known as the Fort McPherson line; 197 on Glenn street from McDaniel Street to ear barn, near Southern Railway; on Crumley street from Cooper street about seven hundred feet to baseball ground; on Church street from Forsyth street to Cain Street; on Cain street from Church street to Orme street; on Orme Street from Chain Street to Mills street; on Mills street from Orme street to Luckie street; on Luckie street from Mills street to North avenue; on Hemphill avenue from North avenue to Pumping Station of City water-works; on Ellis street from Church street to Hilliard Street; on Hilliard street from Ellis street to Irwin street; on Irwin street from Hilliard street to Sampson street; on Sampson street from Irwin street, through private right of way under Southern Railway, to Lake avenue; thence along Lake avenue to Euclid Avenue; thence from Euclid avenue along McLendon street to the county of De Kalb, and along private right of way and Decatur road, to town of Decatur, about seven miles from the City of Atlanta; thence through and around town of Decatur; on Davis street from Mitchell street to Magnolia Street; on Magnolia street from Davis street to Chestnut street; on Haynes street from Mitchell street to Chapel street; on Chapel street from Haynes street to West Fair street; on West Fair street from Chapel street to Chestnut street; on Chestnut street from West Fair street to Greensferry avenue; on Greensferry avenue from Chestnut street to Lee street; on Lee street from Greensferry avenue to Park street; on Park street from Lee street to Ashby street; on Ashby street from Park street to Matthews street; on Woodward avenue from Washington street to Kelley street; on Kelley street from Woodward avenue to Glenwood avenue; on Glenwood avenue from Kelley street to Grant street; on 198 Grant street from Glenwood avenue to Augusta avenue; on Augusta avenue from Grant street to Cherokee avenue; from a point known as Soldiers' Home Junction, along private right of way and western boundary of De Kalb county, to Atlanta Avenue; along Atlanta avenue to Underwood avenue and along Underwood avenue and private right of way to Soldiers' Home, known as the Soldiers' Home Line.

Provided, however, That the particular description of real and personal property above given shall not be construed to exclude any other property, real or personal, rights, privileges, franchises and assets intended to be conveyed hereby, it being the intention hereof to hereby convey to said party of the second part all property, assets, rights, privileges, easements, immunities, and franchises of whatever kind and wherever situated, whether hereinbefore described or not, which, or any right, title or interest in which, the said party of the first part now owns or is in any manner entitled to.

The several portions of property now owned by the party of the first part and hereinbefore described and conveyed are conveyed subject, however, to the following mortgages, so far as such property is severally covered by said mortgages, to-wit:

1. A mortgage executed by the Atlanta Street Railroad Company to the Central Trust Company of New York, as Trustee, dated June 20, 1890, to secure an issue of \$225,000.00 of bonds of said Company.

2. A mortgage executed by the Atlanta Consolidated Street Railway Company to the Mercantile Trust and Deposit Company of Baltimore, as Trustee, dated January 2, 1899, securing \$2,275,000 of bonds of said Company.

3. A mortgage executed by the Atlanta Railway and Power Company and a similar one executed by the Atlanta Railway Company to the Mercantile Trust and Deposit Company of Baltimore, as Trustee, dated July 2, 1900, securing bonds to the amount of \$2,500,000.00 of said Atlanta Railway and Power Company.

And the said party of the second part, as a part of the consideration for this conveyance assumes the payment of the said bonds now issued and outstanding under the said mortgages above referred to, and also assumes the payment of all other liens and incumbrances upon said property and all other debts of the said party of the first part, and agrees to hold the said party of the first part harmless against the same.

To have and to hold, the said property, rights, interests, privileges and franchises, together with all the rights, immunities, easements and appurtenances belonging to or in anywise appertaining to the same to the said party of the second part, its successors and assigns, forever in fee simple, and the said party of the first part hereby warrants the title to the property unto the said party of the second part, its successors and assigns, against the claims of all persons, except as above stated, and further, the said party of the first part hereby covenants and agrees to make, execute and deliver to said party of the second part, its successors and assigns, all such further instruments and conveyances as in the opinion of the said party of the second part, or its legal counsel, may be necessary or proper to further secure and assure the title, enjoyment and possession of said party of the second part to the property, right, immunities, privileges and franchises intended to be hereby conveyed.

In witness whereof, The said party of the first part has caused these presents to be executed and delivered in its name and behalf 200 and under its corporate seal, by its proper officers, hereto duly authorized by corporate action on the day and year first above written as the date hereof.

ATLANTA RAILWAY AND POWER [SEAL]  
COMPANY,  
By D. A. BELDIN,  
*President.*

A. J. CHAPMAN,  
*Secretary.*

Signed, sealed and delivered in the presence of  
W. H. GLENN,  
W. H. WILLIAMS,  
*Notary Public, Fulton County, Georgia.*

#### EXHIBIT "K."

*Grant to Atlanta Street Railroad Company to Construct Railways on Any Street in City and Across Bridge on Broad Street. (2) Not Required to Flag Between Crossings, or Macadamize Streets. (3) Exemption from Taxes. (4) Amount of Fare to be Charged.*

An Ordinance in Relation to the Atlanta Street Railroad Company and for Other Purposes.

Be it ordained by the Mayor and Council of the City of Atlanta:

1st. That authority is hereby granted to the Atlanta Street Railroad Company to construct street railways on any street in the city, and across the bridge on Broad Street.

2d. That so much of Section two of the Ordinance of September 21, 1866, as requires the Company to flag between crossings, also Section six of same date, requiring the Company to macadamize the street for the entire distance around the track, is repealed, and for the present, said company is hereby required to do so in cases of necessity, to be judged by the Committee on Streets.

201 3d. The road, rolling and live stock of said Company is hereby exempted from taxation for the term of fifty years.

4th. The charges for passage on said road shall not exceed twenty cents for any through line and not exceeding ten cents for half lines or short distances.

Resolution passed and adopted, January 1, 1869, Book 5, page 480.

For proceedings leading up to this Ordinance see: Council Meetings, December 18, 1868, Book 5, page 470. Council Meetings, December 28, 1868, Book 5, page 473.

#### EXHIBIT "L."

*Action of Council Approving the Merging of Certain Lines of Street Railroad Into the Atlanta Consolidated Railroad Company.*

Petition.

To the Honorable Mayor and General Council of the City of Atlanta:

The petition of the Atlanta Consolidated Street Railway Company shows that since the twentieth day of May, 1891, its charter has been confirmed by the General Assembly of Georgia, and authority to purchase other street railroads has been given to it, and it has purchased

all of the property and franchises of the following street railroad companies in Atlanta, Ga., to-wit: The Atlanta Street Railroad Company, the West End and Atlanta Street Railroad Company, the Gate City Street Railroad Company, the Fulton County Street Railroad Company, and the Atlanta and Edgewood Street Railroad Company

202 It prays the consent of the Mayor and Council of Atlanta for it to operate said lines according to prior grants to said companies respectively.

It claims that the right to do so already exists, but wishes to have its franchises free from any question or possibility of doubt.

ATLANTA CONSOLIDATED STREET  
RAILWAL COMPANY,  
By JOEL HURT,  
*President.*

Resolution.

Whereas, the Atlanta Consolidated Street Railway Company has purchased the rights, property and franchises of the following street railroad companies in Atlanta, to-wit: The Atlanta Street Railroad Company, the West End and Atlanta Street Railroad Company, the Gate City Street Railroad Company, the Fulton County Street Railroad Company, and the Atlanta and Edgewood Street Railroad Company;

Resolved, That the rights and franchises consented to and granted to said several street railroad companies and to said Atlanta Consolidated Street Railway Company in anticipation of such purchases, made by the Mayor and Council of the City of Atlanta on the Twentieth day of May, 1891, as appears by the minutes of the Mayor and Council on pages 683, 684, 685, 686, and approved by the Mayor on May 20, 1891, and all subsequent grants made to either of said companies, are hereby reconsentend and regranted to said Atlanta Consolidated Street Railway Company on the terms specified in the said grants and consents both as to privileges and obligations.

And the Mayor and Council of Atlanta consent that said Atlanta Consolidated Street Railway Company may exercise upon and in the streets of said city heretofore occupied by said companies respectively all the rights and privileges heretofore owned or possessed by either of said companies respectively, including the rights 203 of extension to any of said lines granted by the Mayor and Council of Atlanta, on said date in 1891, and subsequently thereto.

Provided, however, that nothing herein shall operate as an extension of the time fixed within which anything was required to be done on any of said lines as a condition to the right granted thereon to construct any street railroad, or part of the same on any street or streets.

Adopted December 7, 1891.

## EXHIBIT "M."

Atlanta, Georgia, March 11, 1912.

By Special Committee appointed to negotiate with the Georgia Railway and Power Company and the Georgia Railway and Electric Company.

Whereas, your committee have had under consideration an adjustment of charges for electric current for light, heat and power, and have held several meetings and negotiated with the representatives of said two companies, which negotiations are set forth in detail in the report of your committee attached hereto, and the following such negotiations, we believe that, if the following ordinance is passed, same will be accepted by the said companies, by resolution properly and legally passed, and filed with the Clerk of Council within fifteen days from the approval of said ordinance;

Therefore, be it ordained by the Mayor and General Council of the City of Atlanta as follows:

Section 1. That the City of Atlanta agrees that the Georgia Railway & Power Company, subject to any existing franchises granted by the City to said Companies, may absorb, by consolidation, 204 combination or merger, the following companies; Georgia Power Company, Atlanta Power Company, Piedmont Power Company, Interstate Power Company, Atlanta Hydro Electric Company, North Georgia Power Company, Atlanta Water and Electric Company and lease the Georgia Railway and Electric Company, subject to any existing franchises granted to the said Company by the City of Atlanta, provided, however, that the Georgia Railway and Power Company may, at its option, surrender its franchise within the City of Atlanta or a radius of seven miles from its center, and conduct its business within said City and within said radius under the franchises, rights and privileges of the Georgia Railway and Electric Company, subject to the following conditions:

(a) That the percentage charged on gross receipts of the Georgia Railway and Electric Company as now fixed and established by ordinance shall be maintained and preserved and a like percentage maintained and preserved on all extensions made by or in the name of Georgia Railway and Electric Company, and furthermore, on all business done by the Georgia Railway and Power Company in addition to the business derived through the franchises of the Georgia Railway and Electric Company within a radius of seven miles of the center of the City and all other provisions of the ordinance of 1902 and amendments thereto relating to the grant to the Georgia Railway and Electric Company so far as applicable to the business hereafter done by the Georgia Railway and Power Company, as herein agreed, shall be applied and maintained.

(b) The Georgia Railway and Electric Company or the Georgia Railway and Power Company, whichever one is doing the business of furnishing electric current for light, heat and power purposes,

agrees that the maximum rates to be charged persons or corporations for private or commercial purposes within the present or 205 future limits of the City of Atlanta shall be for regular one year or longer term contracts for the regular supply of the entire electric current used in the premises, and subject to the monthly minimum charge, as follows: The maximum rate per k. w. for current for lighting purposes shall not exceed seven (7¢) cent-net per k. w. hour after making the usual discount on monthly bills for payment on or before the tenth day of the month, and for current for exclusively power or heating purposes shall not exceed four and one half (4½¢) cents net per k. w. h. after making the usual discount on monthly bills for payment on or before the tenth day of each month.

That the present minimum charge per month made by the Georgia Railway and Electric Company for lighting purposes of two (\$2.00) dollars net shall be reduced to — (1.00) dollar net per month, and that the present minimum charge for power purposes made by the Georgia Railway and Electric Company shall be reduced to one (\$1.00) dollar per month for motors up to two horse power and shall be reduced to fifty (50¢) cents net per horse power per month for the horse power capacity of the motor in excess of two horse power.

That the rates as above provided shall become effective not later than the first day of January, 1913, and shall become effective earlier than the said date in the event that the electric current from the Tallulah Falls development of the Georgia Railway and Power Company is ready to be supplied in the City of Atlanta at an earlier date than the said first day of January, 1913.

That the rates when made effective shall apply to all regular contracts with the Georgia Railway and Electric Company for the supplying of electric current in existence at the date when the said rates 206 becomes effective, hereafter, provided said contracts were originally made for a period of one year or longer.

That the said new rates as above established shall not result in the increase of any classes of regular rates now in effect by the Georgia Railway and Electric Company.

(c) That the said company shall for the purpose of supplying electric current to a customer outside the underground district not located on its lines extend its overhead lines along the highways within the City of Atlanta without cost to the customer to an extent necessary to reach a point in front of the premises of the customer not to exceed an extension of two hundred (200) feet from the lines as existing at the time the application is made. That it will, from the lines as existing or the lines as so extended, make the necessary service connection under the same rules as are now in effect with regard to such service connections. That is to say, that regular overhead service connection will be made without expense to the customer from overhead lines, provided, it can be done without setting any additional poles for such service connections between street lines and point at which current is to be delivered.

(d) That the terms of the grants to the said Georgia Railway and Electric Company and the Georgia Railway and Power Company and the several companies above named as being absorbed or taken over by the Georgia Railway and Power Company shall not be interfered with by this grant, but same shall remain as now fixed and established by the ordinances of the city and the laws governing such franchises.

(e) The Georgia Railway and Electric Company or the Georgia Railway and Power Company, whichever is the active company in the City of Atlanta shall hereafter pay into the Treasury of the City of Atlanta a sum equal to the cost or charge for paving sixteen feet on all streets in the City of Atlanta on which said company or companies have double tracks and on which said pavements or repavements shall hereafter be laid, provided, that where said company or companies have only a single track at the time of pavement or repavement only the cost of paving eleven feet of such streets, where hereafter paved or repaved, shall be charged and collected. With reference to repairs, the present law shall be continued. The provisions of this section shall be enforceable only with reference to pavements upon streets where there is an assessment therefor. The assessment against the street car company or the calculation of the amount due under this ordinance shall be based upon the proportion of the entire cost of the pavement without regard to the different character of pavement used. In the paving of streets with permanent pavement, such as asphalt, bituminous or similar pavements, joint pavement shall be used between the street car tracks and eighteen inches beyond the outside rail. This last provision not only to apply where a street is paved with broken stone and chert or water bound macadam or similar pavement.

(f) The City's water supply from any site on Chattahoochee River shall in no way be interfered with by said companies or either of them or by any of their consolidated companies, in any way, either when the season is dry or when the season is wet.

(g) That all of the provisions of this ordinance shall apply to the limits of the City as now established or to the limits of the City as hereafter extended at any future time or times.

208 Section 2. This ordinance and the rights and privileges herein granted to said companies shall be maintained and established by the City in good faith so long as the said companies conform to and observe the conditions of this grant.

Section 3. That all ordinances and parts of ordinances in conflict with this ordinance be and the same are hereby repealed and this ordinance shall become effective upon the filing of resolution from the Georgia Railway and Electric Company and the Georgia Railway and Power Company accepting the terms hereof with the Clerk of Council, provided same shall be filed within fifteen days from the date of

the approval of this ordinance, and, in default of such filing, the provisions of this ordinance shall be of no avail.

Atlanta, Ga., April 20, 1912.

To the Honorable Mayor and General Council of the City of Atlanta:

In accordance with the ordinance of the Mayor and General Council of the City of Atlanta adopted by Council on March 18, 1912, concurred in by the Aldermanic Board on March 18, 1912, and approved by the Mayor on April 16, 1912, Georgia Railway and Electric Company and Georgia Railway and Power Company do hereby accept the terms of the said ordinance. A certified copy of the resolution of the Board of Directors of Georgia Railway and Electric Company and a certified copy of the resolution of the Board of Directors of the Georgia Railway and Power Company authorizing this acceptance to be made are hereto attached.

This acceptance and these resolutions are made in compliance with the requirements of Section Three of the said ordinance.

209      Yours very truly,

GEORGIA RAILWAY & ELECTRIC  
COMPANY,

(Sd.)      By G. W. BRINE,  
                    *Vice President.*

(Sd.)      PAUL D. REID,  
                    *Asst. Secretary.*

GEORGIA RAILWAY AND POWER  
COMPANY,

(Sd.)      By P. S. ARKWRIGHT,  
                    *President.*

(Sd.)      PAUL D. REID,  
                    *Asst. Secretary.*

*Resolution of Directors of Georgia Railway and Electric Company.*

On motion, duly seconded, the following resolution was unanimously adopted, to wit:

Resolved, That the action of the Officers of this Company in filing a written acceptance of the ordinance passed by the General Council of the City of Atlanta, approved by the Mayor, with reference to the adjustment of the lighting and power rates in the City of Atlanta and other matters covered by the said ordinance be, and the same hereby ratified, confirmed and adopted.

*Resolution of Directors of Georgia Railway and Power Co.*

On motion, duly seconded, the following resolution was unanimously adopted, to-wit:

Resolved, That the action of the Officers of this Company in filing a written acceptance of the ordinance passed by the General Council

el of the City of Atlanta, approved by the Mayor, with reference to the adjustment of the lighting and power rates in the City of Atlanta and other matters covered by the said ordinance be, and the same is hereby ratified, confirmed and adopted.

210 Before the Railroad Commission of Georgia.

File No. 13946.

In re Application of GEORGIA RAILWAY AND POWER COMPANY for Increased Fares on Its Street Railway Lines; for Increased Rates for Electric Current for Light, Power, and Other Purposes.

Decided August 14th, 1918.

*Order and Opinion of the Railroad Commission.*

210½ Chas. Murphy Candler, Chairman;  
George Hillyer, Vice-Chairman;  
Paul B. Trammell,  
James A. Perry,  
John T. Boifeuillet,  
Commissioners.  
J. Prince Webster, Rate Expert.  
Albert Collier, Secretary.  
James K. Hines, Special Attorney.

211 Railroad Commission of Georgia,  
Atlanta.

August 14, 1918.

File No. 13946.

In re Application of the GEORGIA RAILWAY AND POWER COMPANY for Increase in Charges to the Public for the Various Classes of Services Furnished.

Upon consideration of the record in the above entitled case of the facts and arguments submitted at the hearing had thereon, and of the report and opinion this date adopted by the Commission containing its findings of facts and conclusions therein with respect to the issues involved, which said report is hereby referred to and made a part hereof, it is

Ordered: That on and after September 1, 1918, and until the further order of this Commission, the following schedules of rates shall be the maximum schedules of rates to be charged by the Georgia Railway & Power Company, for the classes of services indicated:

## SCHEDULE A.

Atlanta, Ga.

*Residence Lighting Scale.*

(Within City Limits. Monthly Basis.)

For the first 100 K. W. H. per month.....	8.88c per K. W. H.
For the next 100 K. W. H. per month.....	7.77c per K. W. H.
For the next 100 K. W. H. per month.....	6.66c per K. W. H.
For the next 200 K. W. H. per month.....	5.55c per K. W. H.
For all over 500 K. W. H. per month.....	4.44c per K. W. H.

Minimum monthly charge, \$1.11.

Subject to a ten (10%) per cent discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

## SCHEDULE B.

Atlanta, Ga.

*Commercial Lighting Scale.*

(Within City Limits. Monthly Basis.)

For the first 100 K. W. H. per month.....	8.88c per K. W. H.
For the next 100 K. W. H. per month.....	7.77c per K. W. H.
For the next 100 K. W. H. per month.....	6.66c per K. W. H.
For the next 200 K. W. H. per month.....	5.55c per K. W. H.
For the next 500 K. W. H. per month.....	4.44c per K. W. H.
For all over 1,000 K. W. H. per month.....	3.33c per K. W. H.

Minimum monthly charge, \$1.11.

Subject to a ten (10%) per cent discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

## SCHEDULE C.

Suburban Districts, Not Incorporated, Adjacent to the City of Atlanta, Ga.

*Residence and Commercial Lighting Scales.*

Monthly Basis.

Within  $\frac{1}{2}$  Mile of Atlanta City Limits.

For the first 100 K. W. H. per month.....	10c per K. W. H.
For the next 100 K. W. H. per month.....	9c per K. W. H.
For the next 100 K. W. H. per month.....	8c per K. W. H.
For the next 200 K. W. H. per month.....	7c per K. W. H.
For all over 500 K. W. H. per month.....	6c per K. W. H.

Minimum monthly charge, \$1.66.

Subject to a ten (10%) per cent discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

Beyond the  $\frac{1}{2}$  Mile Radius of Atlanta City Limits.

1c per K. W. H. higher than the Half Mile scale for the same class of service.

Minimum charge, \$2.22.

Subject to a ten (10%) per cent discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

## SCHEDULE D.

Decatur, Kirwood, East Lake, Hapeville, Gainesville, Carrollton, Ga.

*Residence and Commercial Lighting Scale.*

Monthly Basis.

For the first 100 K. W. H. per month.....	10c per K. W. H.
For the next 100 K. W. H. per month.....	9c per K. W. H.
For the next 100 K. W. H. per month.....	8c per K. W. H.
For the next 200 K. W. H. per month.....	7c per K. W. H.
For all over 500 K. W. H. per month.....	6c per K. W. H.

Minimum monthly charge, \$1.33.

Subject to a ten (10%) per cent discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

## SCHEDULE E.

Hartwell, Royston, Lavonia, Canton, Bowersville, Duluth, Ingleside, Clarkston and Stone Mountain, Ga.

*Residence and Commercial Lighting Scale.*

## Monthly Basis.

For the first 100 K. W. H. per month.....	11c per K. W. H.
For the next 100 K. W. H. per month....	10c per K. W. H.
213 For the next 100 K. W. H. per month....	9c per K. W. H.
For the next 200 K. W. H. per month....	8c per K. W. H.
For all over 500 K. W. H. per month.....	7c per K. W. H.

Minimum monthly charge, \$1.66.

Discount: Subject to a (10%) *per cent* discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

## SCHEDULE F.

Whitesburg, Ga.

*Residence and Commercial Lighting Scale.*

## Monthly Basis.

For the first 100 K. W. H. per month.....	12c per K. W. H.
For the next 100 K. W. H. per month.....	11c per K. W. H.
For the next 100 K. W. H. per month.....	10c per K. W. H.
For the next 200 K. W. H. per month.....	9c per K. W. H.
For all over 500 K. W. H. per month.....	8c per K. W. H.

Minimum monthly charge, \$1.66.

Discount: Subject to a 10% *per cent* discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

## SCHEDULE G.

Atlanta, Ga.

*Retail Power Scale.*

(Within City Limits. Monthly Basis.)

For the first 100 K. W. H. per month.....	5.55c per K. W. H.
For the next 400 K. W. H. per month.....	4.44c per K. W. H.
For the next 500 K. W. H. per month.....	3.88c per K. W. H.
For the next 1,000 K. W. H. per month.....	3.33c per K. W. H.
For the next 3,000 K. W. H. per month.....	2.77c per K. W. H.
For all over 5,000 K. W. H. per month.....	2.22c per K. W. H.

Discount: Above rates subject to a 10% discount, if bills are paid on or before the 10th of the month.

Minimum Charge: 75c per H. P. connected, but not less than \$2.00 net per month.

Contract Period, 1 year.

#### SCHEDULE H.

Suburban Districts, Not Incorporated, Adjacent to the City Limits of Atlanta, Ga.

##### *Retail Power Scale.*

Monthly Basis.

Within  $\frac{1}{2}$  Mile of Atlanta City Limits.

1e per K. W. H. higher than Atlanta Retail Power scale.

Beyond  $\frac{1}{2}$  Mile Radius of Atlanta City Limits.

2e per K. W. H. higher than Atlanta Retail Power scale.

Minimum charge, \$1.00 per H. P. connected, but not less than \$3.00 per month outside of city limits.

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#### SCHEDULE I.

Decatur, Kirkwood, East Lake, Hapeville, Gainesville, Carrollton, Hartwell, Canton, Royston, Lavonia, Bowersville, Duluth, Clarkston, Stone Mountain, Ingleside, and Whitesburg, Ga.

##### *Retail Power Scale.*

Monthly Basis.

1e per K. W. H. higher than Atlanta City retail power rates; with minimum charge of \$1.00 per H. P. connected, but not less than \$3.00 per month.

Contract Period, 1 year.

#### SCHEDULE J.

Atlanta, Ga.

##### *Heating and Cooking Scales.*

Monthly Basis.

Within City Limits: 4.44e per K. W. H.

Minimum charge, \$1.66 per month.

Outside City Limits: 5.55e per K. W. H.

Minimum charge, \$2.22 per month.

Discount: Subject to a (10%) *per cent* discount, if bills are paid on or before the 10th of the month.

Contract Period, 1 year.

#### SCHEDULE K.

##### *Primary Hydro-Electric Rates: Industrial.*

Applicability: All Territory Served by the Company.

Basis for Determining Maximum Monthly K. W. Demand.

(The actual maximum demand for any month, during the continuance of the contract shall be taken as the average rate of using electrical energy by the consumer, during any thirty (30) minute period in such month in which electrical energy is used by the customer at the highest average rate of demand. Peak demands due to short circuits or accidents to machinery, or momentary starting of motors, shall not be counted.)

#### Rates.

Service Charge: \$1.11 per K. W. of Maximum Demand per month, plus an energy charge as follows:

For the first 10,000 K. W. H. per month....	1.33c per K. W. H.
For the next 10,000 K. W. H. per month....	1.11c per K. W. H.
For the next 10,000 K. W. H. per month....	0.88c per K. W. H.
For the next 20,000 K. W. H. per month....	0.66c per K. W. H.

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For the next 50,000 K. W. H. per month....	0.55c per K. W. H.
For all over 100,000 K. W. H. per month....	0.44c per K. W. H.

Discount: Above rates subject to 10% discount if bills are paid on or before 10th of the month.

Minimum Monthly Charge: K. W. of Maximum Demand Charge  
Contract Period, 1 year.

#### SCHEDULE L.

##### *Primary Hydro-Electric Rates.*

Central Station or Municipal.

Monthly Basis.

Applicability: All territory served by the Company.

Basis for determining Maximum Monthly K. W. Demand—Same as Industrial Rates—Schedule K.

## Rates.

Service Charge: \$1.66 per K. W. of Maximum Demand per month, plus an energy charge as follows:

(Same as energy charge for Schedule K. Subject to same discounts.)

Minimum Charge: K. W. of Maximum Demand Charge.  
Contract Period, 1 year.

## SCHEDULE M.

*Secondary or Dump Power Rate Scales.*

Applicability: All territory served by the Company.

By secondary or dump power is meant power which the company may be able to deliver in excess of the power required, reserved, sold or supplied as primary power, and the company reserves to itself the right to shut off or discontinue, or to resume the delivery of said secondary power at its option.

(This scale does not apply to reciprocal contracts entered into with other power companies.)

Rate: .00833 cents per K. W. H.

Yearly Guarantee, \$13.33 per H. P. connected.

Discount: Above rates subject to 10% discount if bills are paid on or before 10th of the month.

## SCHEDULE N.

*Seasonal or Rural Rate Scales.*

Applicability: All territory served by the Company.

(This service is applicable for gins and other industrial developments operating only a part of the year.)

Service charge for those months when connected \$1.11 per K. W. of Maximum Demand, plus energy charge as follows:

For the first	10,000 K. W. H. per month . . . . .	1.33c per K. W. H.
For the next	10,000 K. W. H. per month . . . . .	1.11c per K. W. H.
For the next	10,000 K. W. H. per month . . . . .	0.88c per K. W. H.
For the next	20,000 K. W. H. per month . . . . .	0.66c per K. W. H.
For the next	50,000 K. W. H. per month . . . . .	0.55c per K. W. H.
For all over	100,000 K. W. H. per month . . . . .	0.44c per K. W. H.

**Discount:** Above rates subject to 10% discount if bills are paid on or before 10th of the month.

**Minimum Monthly Charge:** K. W. of Maximum Demand Charge Contract Period, 1 year.

#### SCHEDULE O.

##### *Gas Rates.*

##### Monthly Basis.

**Applicability:** Decatur and Surrounding Territory.

For the first 10,000 cu. ft.....	\$1.25 per 1,000 cu. ft.
For the next 20,000 cu. ft.....	1.15 per 1,000 cu. ft.
For the next 20,000 cu. ft.....	1.05 per 1,000 cu. ft.
For all over 50,000 cu. ft.....	.95 per 1,000 cu. ft.

**Discount:** Subject to 10c per 1,000 cu. ft. discount if bills are paid on or before 10th of the month.

**Minimum Monthly Charge:** \$1.00 per customer meter.

**Ordered further:** That the Georgia Railway and Power Company file with this Commission, monthly statements showing the result of its operations—that is, receipts, disbursements, etc., in detail, showing also comparison with operations for the same month in the preceding year.

**It is hereby expressly declared that the above increases are authorized upon the express condition that the same are necessary because of emergencies arising out of national conditions existing at this time, and upon the further condition that when this emergency shall have passed, the old rates shall be restored upon the orders of the Commission.**

**Ordered further:** That the Georgia Railway & Power Company be, and the same is hereby directed, to amend its customer contracts so as to provide in a heavy black border a notice to its customers substantially in accord with the following, said notice to be shown immediately preceding the contract provisions:

The rates stated in the following proposal or contract are subject to change by the Railroad Commission of Georgia, in the manner prescribed by law, at any time. In the event of such change the new rates prescribed by the Railroad commission will apply from the date made effective, for the unexpired term of this contract.

**Ordered further:** That the Georgia Railway & Power Company be and the same is hereby directed to print on the back of bills rendered to its various customers the rate schedules, upon which the amount of the bill shown on the opposite side has been calculated.

**Ordered further:** That the Georgia Railway & Power Company

be and the said company is hereby directed to print all of its rate schedules, rules and regulations under which service is to be furnished, and that a copy of such publication be posted in the office of the company at each point where it conducts a general business; and also one copy filed with the Mayor or Clerk of Council of the various cities in which the company operates, so that the public may have free and easy access to the rate schedules, rules and regulations of the company as offered to the public in the conduct of its business with the public.

Ordered further: That the scale of rates heretofore obtaining in connection with ceiling fans be and the same is hereby cancelled; in future such service to be furnished on the regular lighting and power scales according to character of service wires to customer's premises.

Ordered further: That the Georgia Railway & Power Company be and the same is hereby authorized and required to discontinue the furnishing of free service, such as supplying lamps, or renewals thereof, etc.

Ordered further: That the Georgia Railway & Power Company be and the said company is hereby directed to cancel all preferential contracts, and all customers using the same class of service shall be placed on the same schedule as above contemplated.

By order of the Commission:

C. M. CANDLER,  
*Chairman.*

ALBERT COLLIER,  
*Secretary.*

218                    Railroad Commission of Georgia,  
                          Atlanta.

Atlanta, August 14, 1918.

File No. 13946.

In re Application of GEORGIA RAILWAY AND POWER COMPANY for  
Increased Fares on Its Street Railway Lines, for Increased Rates  
for Electric Current for Light, Power, and Other Purposes.

Before the Railroad Commission of Georgia.

By the COMMISSION:

Applicant is a corporation under the laws of Georgia engaged in operating street railway service in Atlanta, Kirkwood, Decatur, East Point, College Park, Hapeville and Gainesville, Georgia. It is also engaged in serving the public in these cities and contiguous territory with electric current for heat, light and power uses.

Its services of this character also cover practically all of North Georgia, including forty-six towns, besides a large number of mills, manufacturing plants and industries.

Embraced in these services is the furnishing of current to various municipalities for the pumping of water and other public uses, and for light and power to numerous public institutions, hospitals, army posts and camps. A number of the industries served are largely engaged in the manufacture and supply of Government war materials.

Applicant operates five hydro-electric plants, four steam plants and also purchases current from five or six other plants. It generated and purchased, in 1917, 258,607,882 K. W. H., of which 222,517,604 K. W. H. were accounted for in revenue deliveries.

It operates in Atlanta and vicinity 224 9/10 miles of electric street railway and 7 1/2 miles in Gainesville. Its Atlanta and suburban line consist of 68 1/2 miles of single track and 156 1/2 miles of double track.

Applicant has in service 352 miles of high tension transmission lines, 198 miles of which is on steel towers, and 324 miles of distributing lines, a total of 676 miles of transmission and distributing lines. It has developed water and steam powers, aggregating 160,800 H. P.

The important relation which the applicant sustains toward the industrial and commercial welfare of practically all of North Georgia is evident.

219 In addition to its developed water powers, it owns undeveloped water powers of more than 400,000 H. P., so that its potentialities in the future growth of North Georgia are great.

This Commission is convinced that this section of Georgia is vitally concerned in the ability of applicant to meet its responsibilities as the Trustee of these great industrial resources, and to this end should receive at the hands of the public and governmental agencies fair and unprejudiced treatment. And the fact that the control of the Company is in other sections of the country should not prejudice it.

The water powers developed by these interests and now dedicated to useful public service, for centuries past remained undeveloped and wasted by Georgia owners and interests. This State has need of outside capital in the development of its great resources. It has cordially invited it into its service. Surely then, no different treatment should be accorded it, coming on our invitation, than is given home capital. And besides, such governmental agencies as this Commission, and the public, should bear in mind that hydro-electric developments are comparatively new ventures for capital in this country, and attended with more risks than attach to such long established ventures as steam powers.

Water sheds may be denuded of forests; droughts may and do come; electricity itself is as yet a mystery to the greatest of experts and instrumentalities in its generation, distribution and practical application are not fully perfected, and may within a brief period become obsolete and out of date.

Such considerations indicate that during the development and constructing periods of such enterprises, where risks of loss of capital are great, some measure of considerate, if not liberal, treatment should be extended toward venturesome capital.

This Commission at least is so impressed and shall undertake, therefore, to deal with this application in such a spirit.

And, especially so, under the abnormal conditions now prevailing in this country and throughout the world.

In a recent similar inquiry, the Indiana Public Service Commission aptly said:

"With the outbreak of the European war and, later, with our entrance therein, there have come conditions wholly beyond the previous imagination of any man. As if overnight, we suddenly have been catapulted from an era of economic tranquility into a maelstrom of economic revolution—the path of which has enveloped the entire industrial and commercial activities of the nation. There is no longer such condition as normality of business, and almost every industry or commercial institution finds itself facing critical problems for which there are no landmarks or guide posts."

220      Applicant alleges that because of these abnormal conditions

created by the war; because of the large increase in the cost of labor and of every material and supply used by it in supplying service to the public, and in taxes which it is required to pay to various jurisdictions, its operating expenses have been and are being so increased, that it is no longer, under existing rates, able to meet its fixed charges and taxes, provide for the reasonable conservation of its properties and secure such a return upon the value of its property devoted to the public use, as will maintain its credit and secure additional capital with which to promptly and efficiently meet the public demand for its essential services, and that out of these conditions there has arisen an emergency in its business for which, in the interest of the public as well as of itself, relief is asked in the way of increases in fares and rates. It is alleged that fares and rates established under normal, pre-war conditions, as reasonable and just, are now unreasonably low and do not afford fair return, and that their insufficiency is so marked as to invite disaster or a break down in its public service, unless prompt relief is given for the period of these abnormal conditions.

Applicant submitted voluminous evidence in support of its allegations.

The City of Atlanta, other interested communities, and numerous individual patrons of the petitioner, protested against the grant of the application, but submitted practically no evidence, contenting themselves with the submission of studies and analyses of the evidence submitted by applicant, and arguments contending that the petitioner had not sustained its application.

The evidence submitted makes obvious the fact that the business of applicant has been directly and seriously affected by prevailing abnormal conditions.

The war has created such enormous demands by our Government and its European Allies for man power, materials, industrial essentials, food and capital, that the supply in this country is not equal to our largest needs, and prices and costs have soared.

The Commission knows this—every one knows it—every time one makes a purchase of an article of necessity or luxury, the fact is emphasized. Among the principal elements entering into the cost of petitioner's services are labor, steel and iron essentials, metallic supplies and fuel.

Without halting as to prices, it is difficult, and at times impossible, to obtain these essentials in quantities or as needed.

Increases in the cost of essentials in applicant's business run from fifty to four hundred per cent.

The evidence in this case (the common knowledge of all of us corroborating) shows large increases in the wages paid both common and skilled labor, a large item in the cost of rendering applicant's public services. Increased cost arises out of the inefficiency and uncertain character of much of the labor now obtainable.

Moreover, it is common knowledge that the existing wage scales of petitioner, and other like corporations in the South, must and will be considerably increased, possibly with a retroactive effect, because a living wage only will meet living costs.

On page 21 of one of the Protestants' briefs Counsel says:

"We are going to assume that the Commission will not grant an emergency increase in rates which were voluntarily made by the Company, and which have been in force for a number of years, without protest at least on the Company's part, unless it is shown that the net income produced from these rates is materially less now than it has been throughout the course of these years."

This assumption would have been quite reasonable, but for the omission of some suggestion or condition as that "the necessary investment or amount of property being used in the public service remaining the same, and the net income of previous years producing sufficient funds to provide for current depreciation and some appreciable adequacy of return upon fair property values."

If, for example, the plant being used in the public service in 1918 has been increased fifty per cent. since 1912, would not a larger sum as "net income" be justified?

It is, of course, entirely possible for "net income" to even increase over previous years, and still be insufficient to properly care for the property and maintain the company's credit by such fair returns upon its legitimate and actual capital outlay as it is entitled to in law and good conscience.

Another consideration, in this connection, appears to us should have weight.

Today's business, industrial and financial conditions are abnormal. It is difficult to obtain large new capital for even the most promising ventures. The Federal Government, desirous of conserving capital for governmental needs, is discouraging and in some instances forbidding bond flotations for capital uses.

This Company is bound in law to supply as far as it can the public demand for the services it has undertaken to render. This Commission is vested with power to compel the rendition of adequate

service and to order reasonable extensions and enlargements of its facilities and plants. The Commission has knowledge, through complaints filed with it and the undisputed evidence in this case, of the inadequacy of the Company's existing plants and facilities to meet the present demands for its services. The business interests of this section will suffer if they are not adequately served. The Company has been unable to secure new and needed capital, under war conditions, for the enlargement of its existing plants or the construction of new plants upon its undeveloped water power sites.

22 The insufficient supply of steam coal restricts steam power developments, and enforced methods of conserving coal evidence the wisdom and necessity of a larger use of our valuable and readily available water powers. It is readily seen, therefore, that such rates as will provide only a fair return upon the fair value of the property of this Company now in public service and which are fair to the public and not in excess of the value of the services rendered, because of the abnormal conditions prevalent, are really a necessity and this irrespective of the "net income" of past years, in order that the demands of the public may be met by increased facilities constructed out of such earnings, which under normal conditions would be distributed as dividends.

Protestants have insisted that the existing rates of Petitioner with economical management have been and are bringing in revenue sufficient to meet operating expenses and taxes and provide a fair return upon the fair value of the property used by the public. Counsel contend further that the claims of the Company for depreciation are excessive, and that the record does not contain such information as to the character, age, uses, etc., of its properties as will enable the Commission to ascertain what is a reasonable allowance for depreciation.

It is further argued that in view of the fact that the Company has not in the past set up a depreciation reserve and has gotten along without such, it cannot now claim that the necessity for a depreciation reserve is an emergent cause for an increase in rates.

This Commission is fairly well acquainted with the properties of petitioner. Since the Company's first organization down to date it has had occasion to frequently make exhaustive inquiries into every phase of its business and its operations, the character and extent of its properties, their development and uses, its capitalization and actual values, and the financial results of its operations. Notwithstanding this, under normal conditions, an inventory and appraisal of the Company's properties and an expert audit and analysis of its revenues and expenses would be desirable, if not a duty.

Such a course at this time, in view of the Commission's comparative familiarity with the petitioner's business and properties, and because of the time necessary and the large expense which would be incurred, does not seem justified.

The Commission is abundantly satisfied that it can, without difficulty, arrive at a very conservative estimate of the minimum value of the property of this company in the public use. The Company may complain at our use of a minimum value, rather than the

fair value, but certainly the public cannot. Such value may be estimated by some of the methods approved by the Supreme Court of the United States, and we, of course, are not confined in such an inquiry to the one method of estimated reproduction new and depreciated.

This Commission, nor any other that we know of, takes outstanding capitalization as the fixed measure of values. The open 223 market value of such capitalization, however, may be considered in an inquiry into values and should be weighed.

No Commission, certainly not this, prescribes rates, however, based solely upon capitalization. It is the fair value of the property in use that measures the rate, coupled with the value of the service to the public. Cost of the property is not and should not be used as the sole or exclusive method of arriving at values. It does, however, throw light on such an inquiry and should be weighed.

With a fairly approximate estimate of the minimum value of the property, it is not impossible to arrive at a fair and conservative estimate of what amount should be allowed annually on the property as a whole, for depreciation and obsolescence, without detailed estimate as to each unit, the time in use, probable life, etc. There are several other accredited methods of estimating annual depreciation, based upon observation and experience throughout the country with similar properties. The maintenance of the property of the petitioner has been high, and in the allowance for annual depreciation hereinafter made, this fact has been considered.

As to the advisability, if not the necessity, in the interest of good, continuing service to the public, as well as of justice to the owners of the property of a fair depreciation allowance, this Commission entertains no doubt. Only recently it declined to approve a distribution of surplus earnings by this same petitioner, until provision had been made for depreciation, and reaffirmed the principle that rates should provide therefor.

Protestants have insisted that applicant's claims that an emergency confronts it which requires prompt relief by increased rates, have not been sustained, and that in fact there is not an emergency.

An "emergency" is defined as an unfor-seen occurrence, or a combination of circumstances which call for immediate action or remedy.

If because of war, the operating expenses of a public utility are increased to such an extent (with reasonable certainty that still further increases are inevitable) as that after paying the same, the remaining revenues are insufficient to provide for the reasonable preservation of the property in use, the payment of governmental charges such as taxes, public improvement assessments, interest on lawfully issued bonds, contractual obligations such as reasonable rentals for property used and necessary in its business but not owned, and such a reasonable return upon owned property in use as will sustain its credit, a combination of circumstances apparently exists which calls for immediate action or remedy. It follows that when such a combination of circumstances no longer exists, the necessity for emergency relief ends. Emergency rates therefore, should be temporary and only for the period of the abnormal conditions which necessitate them.

224 A claim for temporary emergency rates must not be used as a means of securing an unreasonable or an unjust return, nor with the purpose thereby of the permanent establishment of higher rates. The conditions of war will not be selfishly capitalized by public utilities with the consent of this Commission, nor shall they be used as a cloak under which to secure returns larger than those to which they are justly entitled. This is a period of national sacrifice and public utilities, like individuals, should be willing to forego such returns as are not necessary to meet operating expenses under careful and economic management, provide for fixed charges, contractual obligations and governmental charges, keep their properties in efficient operating condition and adequacy, and maintain their credit to the end that essential capital for additional facilities to meet the public demands or needs may be secured upon reasonable terms.

And the public should bear in mind that what might be a reasonable return upon a government bond or bank stock or the stock of an established industry producing some staple necessity, cannot be used as a measure of return which a public utility such as a combined street railway and electric generating and transmitting corporation should be permitted. The latter has contingencies, which must be measurably anticipated and properly out of earnings, or it will suffer disaster.

A street railway may in any year, be called upon to contribute large sums under paving assessments, for example, as to which it is not consulted; over which it has no control, and the expenditure in which does not increase its business nor add a penny to its revenue.

The laying of a sewer or change in the grade of a street, as has been often seen in Atlanta, may necessitate the taking up of its rails and the entire reconstruction of its tracks, without adding another dollar to its revenues.

A sleet storm in winter or a hurricane in summer may break down scores of miles of wire and poles and necessitate the rebuilding of miles of expensive transmission and distribution lines, which cannot be charged to capital account. Such incidents may conceivably halt revenues for the time and add to normal expenses simultaneously. They are so recurrent as almost to have become certainties rather than contingencies, and hence has been widely recognized the justice of the claims of such utilities as this, that the normal rate of returns allowed them should be somewhat higher than that of more stabilized business.

This application and our action thereon concerns and affects a very large number of people, as well as the petitioner. Not all of the public are informed as to the established principles which must control in rate making for public utilities.

In the nature of things, it is without knowledge of the amount and character of the large and scattered properties devoted to its service and the large amounts of capital invested therein, by this applicant.

225 The foregoing general observations have been made with the hope that perhaps they may reach some of the public and convey some idea of the magnitude of the interests involved in this

inquiry and of the necessity, which this Commission has striven to appreciate, of dealing with it from an impartial standpoint and with the fullest obtainable knowledge of the underlying facts.

### Property Values.

In the following estimates, the Commission has separated the properties owned by the Georgia Railway and Power Company, and those leased by it from the Georgia Railway and Electric Company, and later consolidated them into one complete property as operated by the Georgia Railway and Power Company. We have not undertaken to arrive accurately at actual values, but have estimated minimum values.

We have used as bases of these estimates, as to the separate property of Georgia Railway and Power Co.—(1) original plans and estimates submitted, under oath, to the Commission in the original capital application of this Company when organized and (2) sworn detailed statements of actual costs of acquisition, development and constructions made from year to year, submitted in bond applications filed with the Commission.

Some items of these costs were deemed excessive and the full amounts reported have been reduced, in our estimates, by more than \$1,000,000. We have excluded undeveloped properties, not immediately needed in its public service, (3) the open market quotations of the outstanding stock and bonds of the Company. Bonds of the Company are not allowed to be issued for the full cost of the construction, but only for 80 and 85 per cent of actual costs. This basis indicates the opinion of investors as to value. In this estimate we have excluded from capitalization outstanding Bills Payable even where claimed to represent capital expenditures, although the market quotations on outstanding capital stock anticipate the payment of Bills Payable, before there can be any application of Company assets to the liquidation of stock.

As to the separate property of the Georgia Railway and Electric Company, we have used,

(1) A detailed inventory and appraisal of its property as made March 18th, 1912, by W. A. Baehr, a consulting engineer of high reputation and character, made for the Georgia Railway and Power Company upon its lease of these properties. In passing upon one of the applications of the latter for approval of a bond issue, the attention of the Commission was called to an item of over \$31,000.00 for the making of this inventory and appraisal, which it was asked should be capitalized.

This was denied. The Commission has called for this Inventory and has carefully studied the same. Made under the circumstances it was, by an Engineer of Mr. Baehr's standing we attach value to it, and excluding "going concern" value included by Mr. Baehr, we have used it as a basis.

Unit prices now are much higher than in 1912 and a fair appraisal based on 1912 unit costs cannot be considered excessive in 1918.

To this we have added amounts for new construction, year by year, since 1912, as sworn to and submitted to the Commission in detailed statements in Bond applications:

(2) The open market quotations of the outstanding stock and bonds of the Company. Bonds are allowed for only 75 per cent of the cost of new construction. It should be remembered that values as indicated by the market quotations of capitalization include all the assets of the Company, among these the capital stock of the Atlanta Gas Light Co., and the Atlanta Northern Railway.

Estimates of the values thus made are as follows:

Georgia Railway and Power Co.

*Property and Development Costs, Excluding Undeveloped Properties Known as Etowah, Newnan, Inter-state, and South Carolina Water Power Sites.*

From Detailed Sworn Statements as Submitted to the Railroad Commission, with Certain Overhead Expenses as Reported Excluded in Part as Excessive.

(Cents Omitted.)

1. Expenditures to October 31st, 1916, under contract of Northern Contracting Company with Georgia Power Company:

(a) Acquisition and development at Tallulah Falls, Mathis and Tugalo.....	\$5,042,037
(b) Transmission lines, rights of way, etc..	1,422,971
(c) Sub-stations, Transformer Stations, Equipment, etc.....	676,571
(d) Telephone lines and equipment.....	99,221
(e) Distribution systems.....	11,207
(f) 20% allowed on above to cover overhead charges, including engineering, contractors' profits, law, organization and general expenses, and interest during construction .....	1,450,401
Total allowed expenditures to October 31st, 1916, under Northern Contracting Co. contract .....	<hr/> \$8,702,408

2. Other new constructions, made directly or purchased by Georgia Railway & Power Co., as per detailed statements in file, between March 17th, 1912 and October 31st, 1916, less items aggregating \$97,326, questioned by the Commission..... \$1,762,198

3. Additional acquisitions and new constructions by Georgia Railway & Power Company, direct or purchased, between October 31st, 1916 and December 31st, 1917, as per detailed statements on file.....	1,024,124
4. Atlanta Water & Electric Co. property and development (known as Bull Sluice), purchased.....	1,500,000
5. Blue Ridge Electric Co. properties and development, including Dunlap Shoals.....	1,135,000

Total, excluding franchises, going value, and undeveloped properties not immediately needed for public service..... \$14,123,730

Georgia Railway & Electric Co.

Leased Properties.

1. Inventory and appraisal, March 18th, 1912, by W. A. Baehr, Engineer, made for the Georgia Railway & Power Company, for use in connection with lease of the properties from the Georgia Railway & Electric Co.:

(a) Reproduction, new, of physical properties .....

\$15,716,445

(b) Estimated condition, March 18th, 1912, 95.35% making depreciated value as of March, 1912.....

\$14,985,885

(c) To which add new acquisitions and constructions, chargeable to Capital Account, made between March 18th, 1912 and December 31st, 1917, as shown in sworn detailed statements filed with the Railroad Commission.....

3,617,010

Total Georgia Railway & Electric Company property, going value and franchises excluded .....

\$18,602,895

(d) In addition to the foregoing, there are included in the lease to the Georgia Railway & Power Company, the Atlanta Gas Light Company and the Atlanta Northern Railway. These are not included in this valuation.

Georgia Railway & Power Company and Georgia Railway & Electric Company, as Jointly Operated, Excluding Atlanta Gas Light Company, Atlanta Northern Railway Company, and Undeveloped Water Power Sites, Except Tugalo.

June, 1918.

*Consolidated Costs and Estimated Minimum Values.*

228	Georgia Railway & Power Company, owned . . . .	\$14,123,730
	Georgia Railway & Electric Company, leased . . .	18,602,895
		<hr/>
		\$32,726,625

Assuming condition as of June, 1918, considering high maintenance expenditures and recent completion of Georgia Railway & Power Company development, to be 95%, deduct for Accrued Depreciation . . . . . 1,636,331

Leaves as indicated present minimum value of physical properties, (Franchises and so called Going Value, excluded) . . . . . \$31,090,294  
To which add necessary cash working capital, 10% of 1917 operating revenues . . . . . 666,365

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\$31,751,659

This Commission does not approve of the method of attempting to segregate and attach specific items of value, as "Going Value," but it believes that there is added value in physical properties which have been unified, adapted and adjusted to special uses and for specific purposes, and assuming that the foregoing costs and estimated values are the "naked" or "bare bones" minimum values of merely the physical properties under consideration, and that some consideration should be given to the fact that actual cash was paid for certain of the franchises of the Georgia Railway & Electric Company, the present value of the properties owned, leased and operated jointly or as one going concern, in our opinion, is not less than . . . \$35,000,000

## Georgia Railway &amp; Power Company.

*Market Value of Capitalization as Bearing upon Present Fair Value.*

June, 1918.

Stock.			
Description.	Amount outstanding, par.	Market quotation.	Market value.
1st Preferred .....	\$2,000,000	75	\$1,500,000
2nd " .....	10,000,000	13	1,300,000
Common .....	15,000,000	9	1,350,000
<b>Total .....</b>	<b>\$27,000,000</b>		<b>\$4,150,000</b>

Bonds.			
1st and Refunding .....	\$12,971,500	78	\$10,177,770
Blue Ridge Elec. Co. ....	236,500	87	205,755
Atlanta Water & Elec. Co. .	1,400,000	87	1,218,000
Savannah River Power Co. .	200,000	87	174,000
<b>Total .....</b>	<b>\$14,808,000</b>		<b>\$11,715,525</b>

## Georgia Railway &amp; Power Company.

Stocks and Bonds.			Market value.
	Outstanding.		
Total Stock .....	\$27,000,000		\$4,150,000
Total Bonds .....	14,808,000		11,715,525
<b>Total Stock and Bonds .....</b>	<b>\$41,808,000</b>		<b>\$15,865,525</b>

This capitalization does not include outstanding Bills Payable. It does include all of the property of the corporation, developed and undeveloped and leaseholds.

## Georgia Railway and Electric Co.

Stock.			
Description.	Amount outstanding, par.	Market quotation.	Market value.
Preferred .....	\$2,400,000	79	\$1,896,000
Common .....	8,514,600	113	9,621,498
<b>Total .....</b>	<b>\$10,914,600</b>		<b>\$11,517,498</b>

## Bonds.

Ga. Rwy. & Elec., 1sts . . . .	\$5,760,000	89	\$5,126,400
" Refunding & Impr. . . .	4,292,000	85	3,648,200
Atlanta Consols. . . . .	1,900,000	95	1,809,000
Atlanta St. Rwy. . . . .	225,000	90	202,500
Ga. Elec. Lgt. Co. . . . .	1,350,000	90	1,215,000
<hr/>			
Total . . . . .	\$13,527,000		\$12,001,100

## Georgie Railway and Electric Co.

230 Stock and Bonds.

	Outstanding.	Market value.
Total Stock . . . . .	\$10,914,600	\$11,517,498
Total Bonds . . . . .	13,527,000	12,001,100
<hr/>		
Total Stock and Bonds . . . . .	\$24,441,600	\$23,518,598

This capitalization does not include Bills Payable. It does include stock ownership of allied companies, such as Atlanta Gas Light Company, as also franchises, leased to the Georgia Railway & Power Company.

## Georgia Railway &amp; Power Co. and Georgia Railway &amp; Elec. Co.

## Consolidated Market Values of Capitalization.

Georgia Railway & Power Company . . . . .	\$15,865,525
Georgia Railway & Electric Company . . . . .	23,384,123
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Total . . . . .	\$39,384,123

The foregoing does not include Bills Payable for Capital Account. It does include all properties developed and undeveloped, owned and leased, including franchises of the two concerns.

## 1917 Operations.

Having undertaken to arrive at the minimum value of the properties, as a whole, used and useful in the public service, the Commission undertook to ascertain the financial results of their operation for the year ending December 31st, 1917, under existing rates.

The following statement is fairly approximate:

## Georgia Railway &amp; Power Company.

## Revenue and Expenditures, All Departments.

1917.

(Cents Omitted.)

Operating Revenues .....	\$6,663,65
Operating Expenses .....	3,524,24

Net Operating Revenue .....	\$3,139,40
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## Non-Operating income, including

Dividends Atlanta Gas Lt. Co. ....	\$165,170
Miscellaneous .....	154,954

.....	820,12
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Total .....	\$3,459,533
Less Taxes Paid .....	485,549

Total Net Income .....	\$2,973,98
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## 231 Less Depreciation:

In view of high maintenance heretofore claimed, supported by Engineer Baehr's condition report in appraisal of 1912, 2½ per cent on total value of physical properties, for Annual Depreciation and obsolescence, seems reasonable, viz., 2½% on \$31,090,254 .....	777,22
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Remainder of Net Income .....	\$2,196,72
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Available for Rentals, other fixed charges, contingencies and return on the fair value of the property and cash working capital devoted to the public use:

## Equivalent to

6.91 per cent on estimated minimum value of naked physical properties and working capital .....	\$31,751,63
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## Or

6.15 per cent on estimated minimum value of unified and adapted properties, \$35,000,000 and cash working capital, \$666,000 .....	\$35,666,00
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## Or

5.57 per cent on value as indicated by open market quotations of outstanding capitalization .....	\$39,384,12
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N. B.—Included in the remainder of Net Income, Supra, \$2,196,727, is \$165,170 of Dividends from Atlanta Gas Light Company. Net Income should therefore be reduced by this sum or the value of the Property in use increased by the value of the Atlanta Gas Light Company property which in another proceeding we have estimated at the minimum of \$3,500,000.00.

Deduction of the net income to the Georgia Railway & Power Company from the Gas Light Company property not included in valuation, \$165,170 from the total net income of \$2,196,727 of all owned and leased property after allowance for Depreciation, leaves ..... \$2,031,557

Equivalent to

6.39% on estimated minimum value of naked physical properties and working capital, of ..... \$31,751,659

Or

5.69 % on estimated maximum value of unified and adapted properties and working capital ..... \$35,666,000

Assuming that the rental paid Georgia Railway & Electric Company is no more than a fair return on the value of the leased properties, and that being a contractual obligation which must be paid, and further assuming that the annual interest charges of the Georgia Railway & Power Company on Bonds lawfully issued must be paid, and that the sum of the two constitute no more than a fair 232 return on the values of the combined properties, and are payable out of net income, the following result of operations appear:

*Disposition of Remainder of Net Income, Based upon Actual Fixed Charges of Georgia Railway & Power Co.*

1917.

Remainder Net Income, all sources, after provision for estimated Annual Depreciation, Supra ..... \$2,196,727

Less Fixed Charges, viz:

(a) Contract rental for leased properties, Georgia Railway & Electric Company .....	\$1,605,572
(b) Interest on Bonds and Notes, Georgia Railway & Power Co. ....	745,823
Deficit .....	\$154,668

### Working Capital.

In the foregoing statements we have allowed as necessary working capital, \$666,000.00, or approximately 10 per cent on gross operating revenue. This is in line with experience and observation. The accounts of the Company of supplies usually carried and cash actually used clearly show that this allowance is not too high.

### Depreciation.

The allowance for Annual Depreciation, 2½ per cent on the estimated value of physical properties used, we are satisfied is not too high. We reached this conclusion after a study of approved tables as to the average life of the more important items constituting the properties, and from an examination of numerous estimates used by various other State Commissions on similar properties.

### Georgia Railway & Electric Company Rental.

The rental paid Georgia Railway & Electric Company for the properties, rights, franchises, etc., leased from it amount to \$1,605,572 in 1917.

The properties leased include all of the railway, electric light and power lines and systems and all of their equipment within a seven mile zone measured from the center of the City of Atlanta, and also the Capital Stock of the Atlanta Gas Light Company and the Atlanta Northern Railway, (the Marietta inter-urban line) and equipment, and the office building in Atlanta known as the Gas and Electric Building.

233 Taxes have been assumed and are paid by the Lessee, the Georgia Railway & Power Company.

In our treatment thus far, it is contemplated that Depreciation is also cared for by the Lessee, so that the contract rental of \$1,605,572, just as paid and without any question of the items going to make up the same, is a clean net return to the owners of the Georgia Railway & Electric Company for the use of their property.

We have estimated the naked physical properties of the Georgia Railway & Electric Company as of a minimum value of \$18,602,895, to which adding \$3,500,000 for the Atlanta Gas Light Company, and \$500,000 for the Atlanta Northern Railway Company, we have \$22,602,895, as the minimum value of the physical properties leased to the Georgia Railway & Power Company. In addition \$465,678 of other assets were turned over with the leased physical properties making, in all, \$23,068,573. If there be recognized any additional value in the properties for unification and adaption and for Franchises for which the public made or makes charges the value of these leased properties at this time can hardly be less than \$25,000.00. A net rental therefore of \$1,605.572, or 6.42%, in our opinion is not unreasonable, considering the character of the business and properties and the many contingencies which may materially affect

earnings. Holding this view, we do not see how we can do else than allow the full amount of the contractual rental as a legitimate charge deductible from "Net Income," as in the immediate preceding statement of "Disposition of Net Income."

#### Interest on Bonded Indebtedness.

The deduction of \$745,823, aggregate of interest charges of the Georgia Railway & Power Company, in our opinion is a proper deduction from Net Income. The Bonded Indebtedness of the Company has been lawfully issued: it was approved by this Commission: it represents 80 and 85 per cent of the cost of acquisition and development of the properties: it does not in our opinion exceed the minimum value of the property against which issued.

Assuming that the contractual rental obligations of \$1,605,572, paid the Georgia Railway & Electric Company is not more than a fair return upon the value of its leased properties, and that it is all of a return which can be properly charged to the public, in other words that the public should allow only this return from rates and that the Georgia Railway & Power Company is not entitled to a return as Lessee, in addition to the fair return to the Lessor), and

Assuming that the interest paid on Georgia Railway & Power Company bonds is a return on the value of its property measured by the par value of outstanding bonds, and

234 Assuming, still further, that provisions for Annual Depreciation is essential and necessary for the conservation of the property and the continuance of efficient service to the public, the Company experienced a deficit in 1917.

The whole question as to the financial results of the applicant's operations for 1917, depends upon the allowance, if any which should be made for depreciation.

Depreciation can be, as a matter of fact, postponed. When this is done, the Company, at once, begins adding to its liabilities. Deferred maintenance and postponed depreciation are liabilities, insidious in character, because there does not happen to be a creditor who insists on payment as his debt is due, and the debt piles up with compound interest, until on the day of reckoning, disaster is realized.

We know of no manufacturing or industrial establishment whose machinery, and developments, structures and constructions of every character, except for some items like dams, forbays, buildings, etc., are so liable to depreciation or so quickly liable to become obsolescent or out of date as an electric plant. Doubtless its reservoirs are steadily filling at this time with sand and mud, and in time their capacity will be so reduced as to require dredging.

Plants of this character are like men, they grow old—they decay—they are relegated or scrapped, as out of date and no longer able to keep step with the lengthening stride of progressive art.

We therefore adhere to our own previous conviction and precedents, and provide an allowance for depreciation and obsolescence, and as we have opportunity, from time to time, shall see that such allowance is properly expended in keeping these properties in an

up to date, efficient condition. We do not believe 2½% on the estimated minimum value of the property as a whole is too high.

We do not believe the applicant is facing bankruptcy.

We are impressed however, with the fact that serious problems of financing confront it, and that upon their prompt solution, depends in a large degree, its ability to render the vitally important services the public demand of it.

The industrial welfare of this community and of the section of North Georgia it serves, to say nothing of its relation to National demands and necessities, is in a large degree dependent upon the efficiency, adequacy and dependability of applicant's service.

Careful study of the results of the Company's operations for six months of 1918, which the Commission has required subsequent to the hearing, shows more favorable results than were anticipated in estimates by the Company during the hearing.

235 But in an inquiry of this character and by a body of this character, the Commission believes that it is not only proper, but its duty, to take notice of well known and officially known facts and action thereunder by governmental bodies.

For example, the National War Labor Board has only very recently put into operation, with retroactive effect, increased wage scales in a number of street car systems, among the number the New Orleans Railway & Light Company. The scale made effective on that system carries a smaller percentage of increase than on several other systems upon which increased wage scales were ordered.

This Board now has before it controversies involving minimum living wage scales in Atlanta, as also Birmingham and Memphis.

The awards of the Board in these cases can be anticipated with almost absolute certainty.

If the New Orleans scale, which on account of local conditions was not increased so largely as have been others, is made effective in Atlanta, it means an increase in the total annual wages to be paid by applicant to conductors and motormen, of \$250,000 to \$350,000, according to the proper construction to be put on certain applications provided for in the New Orleans award.

If any increase is given conductors and motormen, corresponding increases must be allowed all other employees, such as machinists, carpenters, linemen, foremen, inspectors, track help, etc., and such an increase means an additional \$250,000.

This Commission cannot shut its eyes to such facts nor refuse them consideration.

Taking therefor, a comprehensive view of the entire situation as shown and officially known to the Commission, and of all conditions existing and confronting applicant, and of the actual result of its operations for the past eighteen months, and estimated results for the near future under a continuance, which seems certain, of existing abnormal operating conditions, and the growing demands of the public for services which seem essential to its welfare, we feel that temporary relief in the form of somewhat higher rates should be granted.

## Power and Jurisdiction Over Street Railway Rates.

It is our conviction that such emergency relief as seems necessary, should be spread throughout all the rates covering the entire business of the Company.

The Commission finds itself, however, confronted with a grave and difficult question of jurisdiction and power as to affording any of such relief through increases in applicant's street railway rates.

236 Section 5 of the Act of the General Assembly approved August 23rd, 1907, increasing the membership and powers of the Commission, is in part as follows:

"The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged so that its authority and control shall extend to Street Railroads, and Street Railroad Corporations, Companies or persons owning, leasing or operating street railroads in this State:

"Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company: and provided that this Act shall not operate as a repeal of any existing municipal ordinance" \* \* \*

The physical existence of a contract in 1907 between the town of Decatur and the lessor of applicant, prescribing a five cent maximum fare between Decatur and Atlanta is admitted. A similar contract between College Park and applicant's lessor, was in existence.

The Georgia Railway & Electric Company obtained its Atlanta franchises under an Ordinance of the City of Atlanta, approved February 8, 1902, known as the "Consolidating Ordinance." This ordinance contained the terms and provisions upon which the consolidation of the street railways therein named could be made. It was accepted by the Georgia Railway & Electric Company. The proposition of the City and its acceptance by the Company constituted a contract, which contract was in existence in 1907.

The "Consolidating Ordinance" does not, in direct terms prescribe rates. It, however, contains this provision:

"The said Consolidated Company shall for the purpose of giving one continuous ride inside the City of Atlanta from a point on one of its lines to a point on another of its lines, which, however, does not carry the passenger on a parallel line or in the same general direction from which he came, grant one transfer ticket upon the payment of one full fare, provided such transfer is requested at the time of the payment of the fare."

At that time the universal fare throughout the City upon each and all of the lines embraced in the Ordinance was five cents. A "full fare" must have meant the then prevailing fare. To compel the grant of transfers and at the same time throw no restrictions upon an increase in the primary rate would have been to leave the way open to nullify the free transfer, by increasing or doubling the original and customary charge without transfers.

But whether this be the correct view as to what was a "full fare" or not, it is immaterial to a proper conclusion as to the grant of the prayer of petitioner for authority to charge two cents for 237 transfer; to grant it, would to that extent, repeal the consolidating ordinance under which the petitioner is now operating.

The ordinances and contracts relating to rates and transfers, which from the evidence appear to us to have been physically existent on August 23rd, 1907, when jurisdiction as to street railways was conferred upon this Commission, are with the City of Atlanta as to fares and transfers within the City of Atlanta; with the town of Decatur as to fares between that town and Atlanta; with the town of Edgewood as to fares between that town and Atlanta, and with College Park as to fares to Atlanta. Transfer charges were not covered in the Decatur and College Park contracts, nor are fares or transfers, outside of the City of Atlanta covered or affected except as mentioned above.

The question as to whether the contracts physically existent were or are valid contracts is not for us to decide. This Commission is not a judicial body; and so is this true as to the validity of the City and town ordinances. On their face they purport to be ordinances. The Courts only can say whether they are valid, whether ultra vires, or not.

Our view is that when in dealing or considering dealing with the rates of a street railroad, under the terms of the Act of 1907, we come face to face with a contract or an ordinance, in existence on August 23rd, 1907, still subsisting, we are estopped until such obstacle is removed in a legal procedure before a Court of competent jurisdiction, or the General Assembly further acts.

The question before us, is not whether these cities and towns had power and authority to make contracts or pass ordinances fixing or prescribing fares, but whether or not the General Assembly has empowered this Commission to deal with these fares, in the event it finds such contracts or ordinances actually existent.

The General Assembly, in our opinion, could have delegated such power and authority, but as a matter of fact, it appears not to have done so.

This jurisdictional question has been referred to the Special Attorney of the Commission and we have been furnished with his opinion to the effect that we are without power to set aside contracts or ordinances of the character mentioned, under the conditions of the proviso already quoted.

The Commission has adopted this opinion as its own. A copy thereof is attached to this statement and made a part hereof. (Exhibit A.)

Under the conclusion we have reached on this subject, we do not deem it wise or proper to prescribe a different fare on parts of applicant's lines, and not upon all.

## Recommendation to City Authorities.

This Commission believes that applicant is entitled to an increase in its street car fares, and that a six cent fare would be reasonable and just, so long as existing abnormal war conditions prevail, and the justice of granting such increases by amendment to existing contracts and ordinances, is earnestly urged upon the Councilmanic authorities of Atlanta, Decatur, and College Park, with the assurance on the part of this Commission that simultaneously with the effective date of such amendment, similar provisions will be made by it as to fares in territory not included in the municipalities mentioned. The Commission does not recommend any charge for transfers.

This recommendation does not apply to the subject of fares to Camp Gordon, so long as it is used as a Military Camp. We have not reached a definite conclusion as to this, because of certain considerations of the national service the thousands of soldiers in that camp are rendering.

In connection with this subject it may be of value or of interest to state that the Commission has through its Rate Expert made inquiry of official sources in every City in the United States containing 100,000 population and over as to increases in street car fares granted or applications for which are pending.

There are sixty such cities:

Increases have already been granted in the following: Bridgeport, Hartford and New Haven, Connecticut; Boston, Cambridge, Fall River, Lowell and Worcester, Massachusetts; Kansas City and St. Louis, Missouri; Camden, Jersey City, Newark, Paterson and Trenton, New Jersey; Cleveland and Toledo, Ohio; Portland, Oregon; Pittsburgh, Reading and Scranton, Pennsylvania; Providence, Rhode Island; Milwaukee, Wisconsin; and Tacoma and Spokane, Washington.

Petitions to the proper authorities are now pending in Birmingham, Alabama; Los Angeles, and Oakland, California; Denver, Colorado; Indianapolis, Indiana; New Orleans, Louisiana; Detroit, and Grand Rapids, Michigan; Minneapolis and St. Paul, Minnesota; Omaha, Nebraska; Albany, Buffalo and New York, New York; Cincinnati, Dayton and Columbus, Ohio; Memphis, Tennessee; Richmond, Virginia; and Seattle, Washington.

Fourteen of the Cities of this class have no rate increase petitions pending or failed to answer our inquiries.

In Georgia, the Mayor and Council of Macon, have, by ordinance, amended the franchise ordinance of that City by granting a six cent fare, in lieu of the five cent fare heretofore in effect.

This information seems to indicate that the conditions upon which the Georgia Railway & Power Company bases its application, are nation wide and not peculiar to this community.

The jurisdictional question as to street railroad fares, discussed in the foregoing, in our opinion, does not affect the issue as to electric light and power rates, nor in the remotest degree, limit the power of this Commission to deal therewith.

The existing rates in the City of Atlanta were the result of negotiations in 1912 between the City authorities and the Power Company and were then prescribed, by agreement and acceptance, in a City ordinance.

The scale of rates so prescribed by the City and accepted by the Power Company, were filed with this Commission. No request by the City or by the Company, was made of this Commission for its assent to the ordinance or contract prescribing the same, nor has this Commission at any time given formal assent thereto, or do other than recognize them as *de facto* rates.

Without regard however to this fact, the proviso in the Act of 1907, limiting the powers of the Commission, relates expressly and solely to street railroads.

The rates prescribed in 1912 were under vastly different conditions, affecting the cost of service, than those existing today. The Power Company's main hydro-electric development had only begun. It was not completed until 1916. Its cost exceeded estimates. It has been found necessary, recently, to operate steam auxiliary plants oftener and for longer periods during the dry seasons than had been anticipated. The cost of coal has increased until the mere coal cost alone of generating one K. W. H. with steam is, today, approximately one cent. This cost is exclusive of every other item of generating, distributing and operating expense.

A careful study of the existing scale of rates shows inequalities and discriminations in the structure. Some rates are relatively low, others high. The average of rates, under the existing scale, is low.

Comparisons of electric rates prevalent in different cities is frequently misleading, and sometimes difficult because of the varying methods of stating them. Conditions prevailing in different cities are so distinctive as to seriously affect the value of such comparisons.

The character and nearness of fuel supplies; the source of generating power whether steam or water or both combined; the distance of the generating plant from the distributing market, and other local conditions, all affect the value of comparisons of prevailing rates.

There are also many prevalent theories as to rate construction. Because of the character of its business one company will build its rate structure so as to secure its largest revenues from one class or another,—another company is forced to meet peculiar or distinctive competition. Such comparisons however, bearing in mind these and similar considerations, have some value.

240      The Rate Expert of the Commission has prepared, from official sources of information, a statement of the prevailing rates in every city of the United States having a population of 100,000 or over, there being sixty such.

Because of the varying methods of stating rates, Mr. Webster has taken a representative customer of each class of customers in each city, such as residential, commercial lighting, retail power and wholesale power, and basing these upon a certain fixed relation as to installation and amount of energy consumed, (the classification being the same for each city), worked out the amount that would be paid in each city by such customers. These figures show startling differences, and considered in this manner alone, are not of much value. But the ultimate charge to the Community as a whole, taking all classes of customers into consideration, is of value, and he has stated these results.

This study shows that, taking the average of all the rates, which is what the supplying company obtains for its services from the Community, Atlanta has the third lowest average rate in cities in the United States of 100,000 population and over, the figures for the three lowest being:

Los Angles, Cal.....	1.088 per K. W. H.
Oakland, Cal.....	1.311 per K. W. H.
Atlanta, Ga.....	1.316 per K. W. H.

The scale proposed by applicant in its petition, which we have not approved, would place Atlanta as the twelfth lowest of the cities mentioned. The aggregate additional revenue from light and power rates petitioned for is approximately \$400,000.00. We have estimated under the rates which will be promulgated in our order in this application, aggregate additional revenue of approximately \$190,000.00.

We consider the existing commercial lighting scale in Atlanta as high compared with the other classes; and feel constrained to revise these rates downward.

The Company has in Atlanta approximately 10,950 residence lighting customers; about 3,545 commercial lighting customers and 1,375 retail power customers.

It has in its entire territory approximately ninety wholesale (primary) power customers and twelve (secondary) wholesale power customers. It has thirty-one municipal (primary) power and sixteen seasonal power customers.

Power customers secure current because it is more economical than other sources of power available to them. They buy it expecting to make a profit by its use. Its cost is charged, in the end, to the people who consume their products.

They are not forced to use electrical current. Steam power is available as a substitute. They are not therefore solely dependent upon electric power, and can dispense with its use whenever 241 the steam substitute is more economical. The use of electric current for lighting homes and residences is not a use for profit; it is an expense. This is true as to all artificial light in residences. The scale of prices which we shall issue provides therefore for larger percentages of increase in all power rates than in residential lighting rates.

We consider under today's conditions that the residential lighting rates in Atlanta are low and they have been slightly increased. With the exception of residence lighting rates, all of the rates of the Power Company have been heretofore stated in a complicated way, so that the average layman or citizen has difficulty in understanding them. We have undertaken to state the rates we shall prescribe, in a form more easily understood by the average customer of the Company, even if less scientifically stated. The record in this case has developed a number of low, preferential wholesale power rates.

Such preferential rates are illegal and by their discontinuance, increases will follow. The Company should never have given them. The Commission has not found it desirable, because of the numerous inequalities and discriminations found existent in the Company's present scale, to provide for additional revenue with a flat percentage increase in rates, applicable to all classes of its customers.

Much against our inclination and desire we have been compelled to make some revision in the classes, in order that discriminations might not be aggravated and perpetuated. Our utilities regulation law abhors unjust discriminations. They are inherently wrong. As far as practicable we have tried to remove them in our revision.

#### Emergency Rates.

The scale of rates herewith prescribed is intended to meet what we believe are legitimate needs of the applicant for additional revenue brought about by existing abnormal war conditions.

It is not intended to be accepted as permanent.

When normal conditions shall have been restored, or whenever in the opinion of the Commission desirable, a more exhaustive and detailed inquiry into the property values and the operating results of the Company, will be made and such further revision in rates as seems reasonable and just, will follow.

*Opinion of Judge James K. Hines, Special Attorney to the Railroad Commission on Question of Jurisdiction.*

Atlanta, July 17th, 1918.

Railroad Commission of Georgia,  
Atlanta, Georgia.

GENTLEMEN:

Has the Railroad Commission of Georgia, jurisdiction and power to fix passenger rates for the Georgia Railway & Power Company?

Clearly under the Act of 1907, this power is conferred upon the Commission, unless the case falls within the proviso in Section 5 of said Act.

This proviso is as follows: "Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and

provided, that this Act shall not operate as a repeal of any existing Municipal ordinance."

If the Commission fixes passenger rates for this company, will this action impair any valid, subsisting contract, which was in existence between that company and the City of Atlanta on August 23rd, 1907, the date of the approval of said Act of 1907, which placed street car companies under your jurisdiction?

To deprive the Commission of jurisdiction in this matter, such contract must be a valid, subsisting contract; it must have been in existence on August 23rd, 1907, and the action of the Commission in fixing passenger rates for this company must impair such contract.

The "Consolidating Ordinance" of the City of Atlanta, approved Feb. 8th, 1902, is dual in its character, being both an ordinance of the City and a contract between the City and the Company, by which were consolidated the street car lines therein mentioned. This ordinance contained a proposition to the street railway, setting out certain terms and conditions upon which the consolidation of the street railways therein named could be made the acceptance of which by the street railway company constituted a contract.

*City Rwy. Co. vs. Citizens' St. R. Co.* 166 U. S. 557.

*Detroit vs. Detroit Citizens' St. Rwy. Co.*, 184 U. S. 368, 386, 387.

It is hardly open to question, that this ordinance and its acceptance by the Georgia Railway & Electric Company constitute a contract, which was in existence at the time the Act, enlarging the powers of the Railroad Commission, was passed.

243 Then the question arises, is this contract a valid contract?

In Chapter two, Art. 6, Sec. 1, Div. 4, of the Civil Code, providing for the Charter of street railway companies, it is declared, "That no street railway, incorporated under this division, shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities," and "That all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate Authorities."

*Civil Code, Section 2600.*

The Georgia Railway & Power Co., and its predecessors, were incorporated under this law. The Charter of the latter was granted on January 28th, 1902.

*Charters and Franchises 173.*

So both of these companies accepted the privileges and franchises granted them in their charters, "Subject to all just and reasonable rules and regulations by the Corporate Authorities" within whose limits they operate. This is a broad and sweeping provision. It embraces all just and reasonable regulations of both construction and operation.

Now, with this power of regulation conferred upon Municipalities, this company obtained and accepted the ordinances under which it operates.

But it is contended, that the contract, if in fact there be one, between the City of Atlanta and the Street railway company, embraced in the Consolidating Ordinance, is void because the City of Atlanta was without Authority to make such contract.

It is urged that this power cannot be derived from the provision in the Constitution of Georgia, which declares that "The General Assembly shall not authorize the Construction of any street passenger railway within the limits of any incorporated town or city, without the consent of the corporate authorities."

Civil Code Sec. 6448.

It is well said in the able brief of counsel for the railway company that "The scope of permissive terms of consent may be various and the dividing line between valid and invalid conditions may be difficult of discernment."

It is true, that the city cannot name any and all conditions. It cannot impose terms and conditions which are illegal. It can not name terms which cut down and impair the charter powers of a street railway company. It can not fix terms and conditions violative of the Constitutions of this State and the United States.

The City, by its terms, can not enlarge the charter of said company. Nor can the City enlarge its own Charter powers by the terms and conditions of its consent to the construction of a street railway in its streets.

244 It is true, some authorities hold that the power to regulate rates does not appertain to the government of a city, and is not municipal in character.

Webster vs. Superior Court 67, Wash. 37

Garner vs. Mo. & K. Tel. Co. 189 No. 83

City of Woodburn vs. Public Service Com. (Or)

P. U. R. 1917 B 967, 161 Pac. 391.

But this position does not seem to be borne out by sound reasoning. The inhabitants of a city have a vital interest in the charges of a public utility serving them. If the city can regulate them in other respects, and if a street railway can not be constructed in the streets without its consent, why can not such city reasonably and legally impose terms fixing the rates of such utility?

Under the power to make contracts which they deem necessary for its welfare, a city can make a contract for the construction of water works.

Rome vs. Cabot, 28, Ga. 50.

Heilbarn vs. Cuthbert, 96 Ga. 312.

In modern cities transportation and charges for transportation are almost as important to the welfare of their citizens as is water.

The building of school houses are within the scope of the general powers of a Municipal Corporation.

Cartersville vs. Baker, 73 Ga. 686.

Then, why does not the fixing of rates, which a street car company must charge its inhabitants, fall within the general powers of a city?

when such city is authorized to fix the terms upon which the street car company can construct its lines in the streets? But whether the city has the power to fix rates arising from its power to consent or refuse to consent to the construction of street railways in its streets, or not, it seems to me that it has such power in cases where street railway companies are chartered under the general law for the incorporation of such companies. As we have seen above, this law declares no street railways, incorporated thereunder, shall be constructed within the limits of any incorporated town or city without the consent of the corporate authorities and that all such street railway companies, incorporated under this law, shall be "Subject to all just and reasonable rules and regulations by the corporate authorities."

Civil Code, Sec. 2600.

At the time of the passage of the Act for the incorporation of street railways, the power to make rates for such companies had not been delegated by the legislature to the Railroad Commission. There was no agency outside of the legislature for the fixing of such rates. In each case, the incorporated towns and cities of the State would have to appeal to the legislature to fix or alter the rates of their street railway companies. So it was a most reasonable and

proper thing for the legislature to do, in passing an act for the incorporation of street railways, to lodge in the towns and cities

of the State, the power of general regulation over such companies, including the power to fix rates. Under their charters, the Atlanta Railway & Power Company and its predecessor took them, "Subject to all just and reasonable rules and regulations by the corporate authorities" of the towns and cities in which they operate. "All just and reasonable rules and regulations" seem to me to embrace the power to make contracts with such companies as to the rates, which they should charge.

But it is claimed that it has been judicially determined in the case of the City of Atlanta Vs. Old Colony Trust Co., 83 Fed. 39 and 88 Fed. 859, that the City of Atlanta does not possess the power to contract with the street railway company for rates and transfers.

It is true that in this case the Circuit Court and the Circuit Court of Appeals held that the City of Atlanta did not have the power, so far as the Atlanta Consolidated Street Railway Company was concerned, to initiate and fix rates for such company and to require said company to issue transfers.

The Atlanta Consolidated Street Railway Company was chartered by the Secretary of State, prior to the adoption of the general act for the incorporation of street railways by the Secretary of State, and the confirmation of its charter by the legislature afterwards took place prior to the passage of the general act for the incorporation of street railways. There was nothing in the original charter of the Atlanta Consolidated Street Railway Company or in its confirmation by the legislature which made such company subject to regulation by the City of Atlanta. So whether the City of Atlanta could regulate its fares depended upon the general law of the State in ex-

istence at that time. It is true that the Circuit Court and the Circuit Court of Appeals held in the case of the City of Atlanta Vs. Old Colony Trust Company, that the City of Atlanta did not derive this power from the provision of our State Constitution, which prohibits the legislature from authorizing the construction of any street passenger railway within the streets of any incorporated town or city without the consent of the corporate authorities. This case is an authority to that extent only. We question its validity as to the extent, as we shall hereinafter undertake to show.

It is unquestionably true that the fixing of rates for public service corporations is a legislative function of the State, and, while the right to make inviolable contracts, which shall prevent the State during a given period from exercising this right, has been upheld by judicial decisions, it has been quite uniformly held that the renunciation of a sovereign right of this character must be evidenced by clear and unequivocal terms. Such power must be expressed beyond a reasonable doubt.

Milwaukee Elec. R. & L. Co. vs. Wis. Com. 238 U. S. 174.

Los Angeles Water Co. Vs. Los Angeles 177 U. S. 538.

Walla Walla vs. Walla Walla Wated Co. 172 U. S. 1.

New Orleans Water Wks. vs. Rivers 167 U. S. 674.

246 Vicksburg vs. Vicksburg Water Wks. 206 U. S. 496.

Freeport Water Co. vs. Freeport 180 U. S. 587.

It must be borne in mind that the question in this case is, not whether the State of Georgia has surrendered to the City of Atlanta the sovereign right to fix the rates of this company, so that the same can not be altered or changed, but whether the legislature of this State has delegated to the Railroad Commission the power to fix such rates, where the same had been previously fixed between the city of Atlanta and the company by contract or ordinance. This distinction is of vital importance in this discussion. We repeat that the question is not, whether the State of Georgia has surrendered its power to fix these rates, but whether it has granted to the Railroad Commission of Georgia, the power to fix such rates, when the same had been fixed by contract between the city and the company, or by municipal ordinance. We do not contend that any such surrender of this governmental function has been made by the legislature to any of the towns or cities in which this company operates.

As the state has not actually divested itself of the power to fix these rates, an agreement, by which the city and this company fix these rates, is made subject to the right of the state to change the same.

L. & N. R. Co. vs. Mottley 219 U. S. 467.

Union Dry Goods Co. vs. Ga. Public Service Corp. 142 Ga. 841.

Yate Man vs. Towers 126 Md. 513 P. U. R. 1915 E 811.

Portland R. Light & P. Co. 229 U. S. 397.

Dawson vs. Dawson Tel. Co. 137 Ga. 62.

If no specific authority has been conferred on the city to enter into these contracts, the right of the state to interfere, whenever the public welfare demands such action, was not abrogated; but these contracts remain valid between the parties to them, until such time as the state sees fit to exercise its paramount authority.

Manitowoc vs. Manitowoc & N. Traction Co. 145 Wis. 13.  
Denver & S. P. R. Co. vs. Englewood (Col.) P. U. R. 1916, E. 134.

Benwood vs. Public Service Com. 75 W. Va. 127.

In other words, in the absence of express and unequivocal authority conferred by the legislature on a city to that effect, the legislature power of fixing rates is not abrogated; but the legislature can at any time fix such rates, or alter, or abolish such contract rates. But until the state does so act, rates fixed by municipalities, granting franchises to street railway companies, where such grants are accepted by such companies, are binding.

Such contracts are permissive and valid, and are binding upon the parties until such time as the state may change such rates, or fix different rates. Such contracts are permissive contracts, but, nevertheless, are valid contracts until the state acts and sets them aside.

Applicant admits the physical existence of a contract between the town of Decatur and the Applicant. A like contract exists between College Park and this company.

Now arises the question, whether the fixing of rates by the Railroad Commission of Georgia will impair these contracts or have the effect of repealing the respective ordinances in which they are embraced.

We will deal with the City of Atlanta first. The Consolidating Ordinance contains this provision:

"The said Consolidated Company shall for the purpose of giving one continuous ride inside the City of Atlanta from a point on one of its lines to a point on another of its lines, which, however, does not carry the passengers on a parallel line or in the same general direction from which he came, grant one transfer ticket upon the payment of one full fare, provided such transfer is requested at the time of the payment of the fare."

It is true that this ordinance does not make any direct provision as to rates. In other words, it does not name the amount which shall be paid for a fare. It provided that the company shall "Grant one transfer ticket on the payment of one full fare."

It is claimed that "There was no purpose to contract as to the rates of fares," and that "What was one full fare was not the subject of agreement."

It is further claimed that "One full fare" does not mean a fifteen cent fare." It is pertinently asked: "If that was meant why didn't the parties say so?" The same inquiry might be made in the case of any ambiguous ordinance or agreement; but the fact of failure

to be clear and explicit in the language used in any document does not authorize a presumption for or against a given construction.

The language, "One full fare" is ambiguous. In determining its meaning we must take into consideration all the surrounding circumstances. At the time the fare was five cents. While some of the companies were authorized to charge more than five cents, they did not, in fact, charge any greater rate.

Is it reasonable to suppose that the City of Atlanta granted to the Consolidated Company the various important rights and franchises embraced in this ordinance, and left to this company the right to charge any rate of fare it saw fit, subject only to legislative regulation? Would the city grant such valuable franchises, without attempting to guard against an increase in rates?

What would a transfer ticket be worth if the company was left free to double or treble the "One full fare"?

In support of the contention that "one full fare" does not mean a five-cent fare, reference is made to the repeal of Sec. 1351 (H) of

the City Code of 1899, being Sec. 5758 of the City Code of 248 1910 by the Consolidating Ordinance. This section was a

part of an ordinance passed on August 22, 1899, and provided that "no person, firm, corporation or association hereafter obtaining authority or consent to construct or operate a line or system of street railways in the limits of the City of Atlanta, as now or hereafter defined, shall be permitted to collect for fares for single passengers from one point of the line or system of such company in the City limits as aforesaid, more than for one continuous trip from 12 P. M. to 5 A. M. ten cents."

It may be asked why the city should repeal this ordinance which prescribed a five-cent fare from 5 A. M. to 12 P. M. practically all day, if it was not the purpose to show that the city and the company both understood that they were not contracting for a five-cent fare.

The purpose of the city might have been to get rid of the ten-cent fare from 12 P. M. to 5 A. M.

At the time the Consolidated Ordinance was passed, there were two other ordinances of the City of Atlanta embraced in the City Code of 1899, being sections 1335 and 1336. These ordinances appear as sections 2721 and 2722 in the City Code of 1910. Section 1335 provides that from and after the first day of May, 1897, it shall be unlawful for any company operating electric or other railways upon the streets of Atlanta to charge more than five cents for the transportation of any person from any point on said line or lines to any other point or points on any line or lines operated by said company, whether the same be for continuous passage on through lines, or by transfer to any other line or lines.

The ordinance, from which sections 1335 and 1336 of the City Code of 1899 were codified, was enacted in 1897. If it were the purpose of the City not to contract for a five-cent fare, why was it that this section of the City Code was not repealed? It was left on the statute book of the city. By the repeal of 1341 (H) of the City

Code of 1899 the city got rid of the ten-cent fare from 12 P. M. to 5 A. M. By the retention of section 1335 of this code the city retained, or attempted to retain, the five-cent fare with transfers during all hours of the day. Furthermore, section 1336 uses the language, "Upon the payment of one full fare, as above provided, it shall be the duty of the said railway company to transport such passenger to his destination upon any line or lines of said company, and to furnish a transfer ticket without additional charge, whenever it is necessary for said passenger to change to the car of any line or lines operated by said company, in order to reach his said destination."

These two sections furnish a definition of the language, "One full fare" used in the Consolidating Ordinance, and make the term mean a five-cent fare.

But whether or not this construction of "One full fare" is correct or not, it is immaterial to the proper conclusion to be reached in this matter.

The street railway company asks for a six-cent fare within the city limits of Atlanta and two additional cents for each transfer.

249 So clearly, if the Commission grants the application of the street railway company, its action will impair this contract between the city and the street railway company, and will pro tanto repeal the Consolidating Ordinance under which the street railway company is now operating.

There is no question that if the application of the street railway company is granted by the Commission, this action will amount to an impairment of the contract between the cities of Decatur, College Park and Edgewood on the one part and the street railway company on the other part.

Where the company accepted and acted upon a franchise to fix its maximum fare, the Railroad Commission of Vermont has no jurisdiction under the act of that State giving the Commission jurisdiction over the matter of tolls and rates, except where governed by special provisions of law.

Barre vs. Barre and M. Traction & Power Co. 92 A. 237.

So, in my opinion, the Railroad Commission of Georgia is without jurisdiction to fix the rates within the City of Atlanta, and the rates from and to the other cities above mentioned, so as to alter or change the rates prescribed in the contracts between the company and these cities. The only tribunal, which can change these rates, is the legislature of Georgia, the latter having excepted from the grant of power to this Commission the right to impair these contract rates or to repeal ordinances under which they were fixed.

The Commission has jurisdiction over the matter of transfers outside of the City of Atlanta, except where this matter is specially controlled by the contracts between the company and the other cities above referred to. The Commission can provide fares higher than five cents on the Decatur line between the hours of 12 o'clock midnight and 5 o'clock A. M. The Commission has power to regulate

the matter of transfers on the line from College Park to Atlanta. The College Park contract only provides that there shall be no greater fare than five cents for each passenger from the southern limits of College Park to some central point in the City of Atlanta. Therefore, the Commission can provide extra compensation for transfers to and from College Park.

Clearly, the Commission has power and jurisdiction to fix fares for transportation of passengers in the territory lying outside of the City of Atlanta in those cases where these fares are not controlled by said contracts hereinbefore referred to.

There is no question over the power of the Commission to fix gas, electric light, heat and power rates.

It seems to me that the Commission, which has no judicial functions, should go slowly in declaring contracts and municipal ordinances null and void; and that in all cases the doubt should be resolved in favor of the validity of such contracts and ordinances.

250 The conclusions herein reached are not free from doubt but represent the best opinion which I have been able to form after careful study of the able briefs of counsel for the applicant, and from an investigation of the authorities at my command.

(Signed)

JAMES K. HINES,

*Special Attorney.*

#### EXHIBIT "P."

*(Text of Report.)*

The Committee's report, which is signed by J. L. McCord, as chairman, in which the railroad commission's decision is reviewed and criticised as unsound and unfortunate, follows:

"To the Mayor and City Council of Atlanta:

"The railroad commission of Georgia has announced its decision in the matter of increased rates and fares petitioned for by the Georgia Railway & Power Company and its subsidiaries. With reference thereto your committee reports as follows:

"In its immediate results the decision (if disturbed) would mean increased rates for gas, hydro-electric power, and residence lighting and heating service in Atlanta. Commercial lighting rates would be somewhat reduced. As to street railway fares in Atlanta, the railroad commission declines to assume jurisdiction because such fares are the subject of contract between the City and the company. Nevertheless the commission went outside the province and rendered an opinion in which the view is expressed that the street railway fare in Atlanta ought to be increased. The commission's conclusions on that subject are embodied in a recommendation to council that it amend the street railway franchise in Atlanta and authorize a 6 cent fare without charge for transfers.

"The increases in gas and electric rates that were specifically allowed would cost the company's patrons about \$400,000 a year. Of

that sum the City of Atlanta would be compelled to pay considerably more than it now pays for municipal electric service. Had the petitions been granted in full there would have resulted a total annual increase of more than \$1,500,000 in revenue to the company.

"In its opinion the commission recognizes that during the year 1917 the company made more money than it had ever made 252 before. Likewise the commission recognizes that in 1918 the company will make more than it made in 1917 (without any increased rates) although it is predicted that wage increases are to be expected in the future.

"Despite such a showing the commission concluded that an emergency exists calling for still more revenue in order that the company might be aided in meeting its capital requirements. It is not suggested that such capital requirements pertain to the properties in the city of Atlanta. Apparently it is with reference to outside projects that the company requires some further financing.

#### "Minimum Valuation.

"From various sources the commission gathered information upon the basis of which it concluded that a "Minimum" valuation of the company's physical properties and working capital in 1917 amount to \$31,751,659. As to the properties outside Atlanta the commission reached its valuation conclusions largely upon its previous action with reference to stock and bond issue since 1912. Having in 1912 and subsequently approved the scheme of organization of the power company and having given vitality to earlier projects taken over by that company, the commission evidently determined to adhere to its former conclusions and not go back on the plan of capitalization that it had once approved.

"With reference to properties inside Atlanta, owned by the Georgia Railway and Electric Company, the commission largely rests its valuation conclusions upon the basis of an appraisal made in 1912 by an engineer employed by the company at the time it was endeavoring to secure approval by the commission of its consolidation plans. That appraisal was not introduced in evidence in this rate proceeding but was called for by the commission presumably after the evidence was closed; your committee did not know of its existence until 253 it was referred to by the commission in its opinion; and there has been no opportunity to inspect it or to cross-examine the engineer who made it up.

"But having thus arrived at what it terms a "minimum" valuation of the company's properties, the commission finds that in 1917, the company nevertheless derived a return of 6.91 (nearly 7) per cent on such valuation, after deducting all operating expenses, taxes, and after making allowance for a depreciation reserve amounting to \$777,256 in 1917 alone. Even such a return is deemed inadequate by the commission.

### Beyond the Issue.

"With reference to this matter of valuation of the company's properties and the return derived thereon, it should be said that throughout the case the power company insist- that it was not asking a fair return on what it deemed to be the value of its properties. The reason for that attitude was that the company did not welcome the delay that would have been involved had anything like a real valuation been undertaken. The commission therefore, went beyond the issue in the case as made by the company itself and drew on its own resources for the purpose of getting up what it terms a "minimum valuation.

"As to the distribution of the company's profits, the commission likewise took occasion to approve in terms the arrangement by which the power company has lease- for nearly one thousand years all the properties of the Georgia Railway & Electric Company. Under that lease the power company gets all the revenue earned by the electric company and in turn pays all the expenses, interest, taxes and other fixed charges, and in addition pays to the stockholders of the electric company an annual dividend of 5 per cent on their preferred stock and 8 per cent on their common stock. Such rental was held to be no more than proper, notwithstanding the water contained in the stock of the electric company which, however, the commission

254 seems to have ignored.

"The Commission gives the impression that your committee furnished no evidence at the hearing. Aside from the technical inaccuracy of that suggestion, attention is invited to the fact that after the power company had put in all its evidence counsel for your committee desired sixty but urged the commission to grant them thirty days' time in which to analyze the company's evidence and prepare their own. The commission declined that request and gave the committee's attorneys only eighteen days' time. Nevertheless the commission consumed more than forty-five days in arriving at its own conclusion and in promulgating its opinion.

"On that subject it should likewise be said that throughout the case the power company consistently adopted an obstructive attitude toward your committee and frustrated every effort on its part to procure information contained in the company's books and records. The right to inspect such books and records was denied.

### Most Unfortunate.

"Altogether your committee has concluded that this decision the Georgia Railroad Commission is a most unfortunate one, not only because of the specific increases allowed, but in addition because of the whole tenor and purport of the commission's attitude as reflected in its opinion. That opinion apparently ignores fundamental rights as between the public and the company in assuming that those fundamental rights have in some way been affected by the existence of war; it assumes that the commission's authority has been enlarged

without constitutional or legislative action, and manifests a spirit of benevolent control according to which the commission assumes it is charged with the responsibility of developing water powers in Georgia by encouraging the investment of outside capital in such projects, thereby imposing on the people of Atlanta the burden of high rates in order that such outside projects may be fostered.

255 "Your committee dislikes the necessity and duty of thus expressing such an unfavorable view concerning the commission's decision. It is nevertheless driven to the conclusion that the inevitable day has come when this issue must be fought out and settled now for all time. Your committee is conscious of the great benefits that inure from the development of water power projects throughout the state; but it is equally convinced that there are other ways to attain these purposes than to impose on the people the continual maintenance of high rates in order that the Atlanta properties may be exploited and made to bear the burden of providing funds for such other operations.

"Your committee has diligently endeavored to protect the interests of the public and makes this report in order that you may determine what proceedings should be had and furnishing the means therefor.

"Your committee makes the following recommendations:

1. Prior to September 1st legal proceedings should be instituted to enjoin and prevent increases in gas, light and power rates, as well those charged to the public as to the city of Atlanta.
2. City Council should not authorize an increase in street car fares.
3. Should the company undertake legal proceedings to compel the Railroad commission of Georgia to assume jurisdiction over street railway fares in Atlanta, the City's interests should be protected in such proceedings.
4. Your committee further recommends that steps be taken as soon as possible to procure a divorce of the properties of the Georgia Railway and Power Company and those of the Georgia Railway and Electric Company. Such a course is demanded since otherwise it may be expected that the people will be called upon to continue to bear the burden of sustaining outside projects in which they have little or no direct interest.

256 "Be it resolved by the mayor and general council, That the report of the committee appointed to consider and take action with reference to the question of increases in gas, electric light and power, street railway rates in Atlanta is approved, its recommendation adopted and the committee continued. Be it further

"Resolved, That the committee in conference with the city attorney is empowered and direct- to institute such legal proceedings as may seem proper, having in view the prevention of increases in gas and electric light and power rates in Atlanta, the cancellation of the opinion and order of the railroad commission, and be further empowered and directed likewise to represent the city's interests in sus-

taining the validity of the present franchise, fixing a 5 cent street car fare in the City of Atlanta, and that said attorney and committee are directed likewise to take such steps as may seem proper having in view the institution of legal proceedings intended to divorce completely the ownership, operation and management of the Georgia Railway and Power Company and the Georgia Railway and Electric Company. It is further

"Resolved, That said committee be authorized to associate in behalf of the city such assistant counsel as may be deemed necessary and advisable."

Due & legal service of the within petition, rule nisi & process as knowledge, copy received; copy, process, copy of process & service of same waived; all other & further service waived.

Aug. 24, 1918.

C. M. CANDLER  
GEO. HILLYER.  
JNO. T. BOIFEUILLET  
PAUL B. TRAMMELL  
JAMES A. PERRY.

Filed in office, this the 23 day of Aug. 1918.

S. T. CONYERS,  
*Deputy Clerk*

257 This case coming on to be heard upon the issues made by the pleadings, and after hearing the same it is considered ordered and adjudged by the Court that the mandamus prayed for be and the same hereby is denied.

October 2d, 1918.

GEO. L. BELL,  
*Judge S. C. A. C.*

GEORGIA,

*Fulton County:*

Fulton Superior Court, November Term, 1918.

No. 40900.

GEORGIA RAILWAY & POWER CO.

vs.

RAILROAD COMMISSION OF GEORGIA et al.

Mandamus.

Now come C. M. Candler, Geo. Hillyer, Paul B. Trammell, Jno. T. Boifeuillet and J. A. Perry, Railroad Commission of the State of Georgia, defendants in the above stated case, by James K. Hines, Special Attorney, for the Railroad Commission of Georgia and demur to the petition in the above stated case, on the following grounds to-wit:

(1)

Because no cause of action is set out in said petition.

(2)

Because plaintiff is not entitled to the Writ of Mandamus under the facts stated in said petition.

(3)

Because the Railroad Commission of Georgia is without power, authority and jurisdiction to fix and establish rates for the Georgia Railway & Power Company in the Municipalities named in said petition because the exercise of such power would impair valid subsisting contracts between said Municipalities and petitioner, and because such action on the part of the defendants would have the effect of repealing the municipal ordinances, which are set out in the petition in said case.

Because under the proviso in section 5 of the act of Aug. 23rd, 1907, enlarging the jurisdiction of the Commission, said proviso being now contained in section 2662 of the Civil Code of Georgia, and being as follows: "Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any Municipality and any such company; and provided, that this section shall not operate as a repeal of any existing Municipal ordinance," the Railroad Commission of Georgia can not and has not the power, authority and jurisdiction to fix passenger fares for petitioner in the municipalities of Atlanta, Decatur, Edgewood, and College Park, under the contracts and ordinances referred to and set out in petition of said case.

JAMES K. HINES,  
*Special Attorney for the Railroad  
Commission of Georgia.*

Filed in office this 13th day of September, 1918.

T. C. MILLER,  
*Dpty. Clerk.*

259 **GEORGIA,**  
*Fulton County:*

Fulton Superior Court, September Term, 1918.

No. 40900.

## GEORGIA RAILWAY & POWER CO.

vs.

RAILROAD COMMISSION OF GEORGIA et al.

### Mandamus.

Now comes the Railroad Commission of Georgia, and C. M. Candler, Geo. Hillyer, Paul B. Trammell, Jno. T. Boifeuillet, and J. A. Perry, as Railroad Commissioners of said State, and as defendants in the above stated cause, by their attorney Jas. K. Hines, and for answer to the petition in said case say:

(1.)

These defendants admit the allegations of paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 13, 14, 15, 16 (A), 16 (B), 16 (C), 18, 19, 20, 21, 23, 24, 25, 26, 28, 29, 33, 34, 35, 37, 38, 40, 43, 44, 45, 46, 47, 48, 50 and 52.

(2.)

These defendants deny the allegations of paragraph 6 of said petition, except as herein qualified. These defendants submit that the Railroad Commission of Georgia is without power, authority and jurisdiction to fix fares for applicant where such action would impair valid subsisting contracts between the Municipalities in which petitioner operates its street railway lines and petitioner in existence on Aug. 23rd, 1907, or where such action would have the effect of repealing ordinances which existed on August 23rd, 1907.

(3.)

These defendants deny the allegations of paragraph 12 of said petition.

(4.)

These defendants deny the allegations of paragraph 16 of said petition except as herein qualified.

260 (5.)

These defendants admit the allegations of paragraph 17 of said petition as except herein qualified. The Rapid Transit Company for a short period during a rate war sold three tickets for ten cents.

(6.)

These defendants deny the allegations of Paragraphs 22, 30, 31 and 32 and 36 of said petition.

(7.)

These defendants admit the allegations of paragraph 39 of said petition, except as herein qualified. They deny that the franchise contract therein set out is indefinite.

(8.)

From lack of information, these defendants can neither admit nor deny the allegations of paragraph 41 of said petition.

(9.)

These defendants deny the allegations of paragraph 42 and 49 of said petition, except as herein qualified. They admit that under the Constitution and the laws of this State, the power of fixing railroad fares is vested in the legislature except as limited in the Constitution itself. Joel Hurt was the only witness who was sworn in in behalf of protestants, but the latter contended that applicant had not made out in case of its evidence.

(10.)

These defendants admit the allegations of paragraph 51 of said petition, except as herein qualified. They deny that the Commission has jurisdiction and authority to grant the increased street railway fares, sought by petitioner.

(11.)

These defendants deny the allegations of paragraphs 53 and 261 54 of said petition. From lack of information, these defendants can neither admit nor deny the allegations of paragraph 55.

Wherefore, having fully answered said petition, these defendants pray to be hence discharged with their reasonable costs in this behalf expended.

JAMES K. HINES,  
*Atty. for Defendants.*

GEORGIA,

Fulton County:

Before the undersigned, personally came C. M. Candler, who on oath deposes and says that he is one of the defendants in the above

stated case, and is chairman of the Railroad Commission of Georgia and that the facts stated in the foregoing answer are true.

C. M. CANDLER

Sworn to and subscribed before me, this 3rd day of September 1918.

J. P. WEBSTER,  
*N. P. at Large.*

Filed in office this the 13th day of September, 1918.

T. C. MILLER,  
*Dpty. Clerk.*

GEORGIA,

*Fulton County:*

Be it remembered That at the September Term 1918, of the Superior Court of Fulton County, Ga., to-wit: on September 18, 1918, there came on to be heard before said court, his Honor Judge Geo. L. Bell, Judge of said Court, presiding, a certain cause, to-wit, the petition of the Georgia Railway & Power Company against C. M. Candler, George Hillyer, Paul B. Trammell, John T. Boifeuillet and J. A. Perry, constituting the Railroad Commission of Ga., same being cause number 40900, Fulton Superior Court, and being the hearing on the rule nisi on a petition to show cause why a mandamus absolute should not issue in behalf of the petition- against the defendants as prayed for in the petition, that said cause proceeded from day to day until October 2nd, 1918, at which time his honor, Judge Geo. L. Bell, rendered a decision in the cause, overruling the prayers of the petition and refusing to grant a mandamus absolute as prayed in the petition, to which ruling and order, same being a final order in the cause, said petition then and there excepted and now excepts, and the petitioner says that his Honor Judge Geo. L. Bell, erred as a matter of law in overruling said petition, and in denying said mandamus absolute as in the petition prayed, and that His Honor, Judge Geo. L. Bell, erred as a matter of law in not granting and ordering said mandamus on each and every ground alleged in the petition.

As evidence in the cause, it was agreed by all parties thereto that the facts in the cause were as stated in the petition and exhibited thereto, and that said petition and exhibits thereto did truly state the facts in the cause to be considered as evidence before the court on said hearing, and it was further agreed by all parties to said cause that procedure by mandamus was the proper procedure in the cause and the parties so stated to the Court in open court.

The petitioner specifies as material to a clear understanding of the errors complained of the following parts of the record, to-wit:

1. The original petition with all exhibits thereto, omitting entries of service.
2. Demurrer of defendants.
3. Answer of defendants.

## 4. Order of the court denying the mandamus absolute.

And now within the time required by law, comes said petitioner, Georgia Railway & Power Company, and tenders this its bill of exceptions and prays that the same may be signed and certified that the errors complained of may be reviewed and corrected.

263

KING AND SPALDING,  
C. T. & L. C. AND J. L. HOPKINS,  
BREWSTER, HOWELL AND HEY-  
MAN,  
COLQUITT AND CONYERS,  
ROSSER, SLATON, PHILLIPS AND  
HOPKINS,

*Attys. for Ga. Railway and  
Power Co., Plff's in Error.*

I do certify that the foregoing bill of exceptions is true and contains all the evidence, and specifies all the record material to a clear understanding of the errors complained of, and the Clerk of the Superior Court of Fulton County, Ga., is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the Supreme Court of Ga., that the errors alleged to have been committed may be considered and corrected.

This Oct. 2nd, 1918.

GEO. L. BELL,  
*Judge S. C. A. C.*

Due and legal service of the within bill of exceptions acknowledged copy and all other and further notice and service waived.

JAMES K. HINES,  
*Atty. for Defendants in Error.*

Due and legal service of and copy of this bill of exceptions are hereby acknowledged.

This Oct. 2nd, 1918.

JAMES K. HINES,  
*Atty. for Deft. in Error.*

Filed in office this the 2nd day of October, 1918.

ARNOLD BROYLES,  
*Clerk.*

No. —.

THE GEORGIA RAILWAY &amp; POWER CO.

vs.

C. M. CANDLER et al. and THE RAILROAD COMMISSION OF GEORGIA

The remittitur in the above stated case having been sent down from the Supreme Court to the Superior Court of Fulton County and now awaits the action of the Superior Court:

Now therefore, it is considered, ordered and adjudged that the judgment of the Supreme Court in the above stated case, be and the same is hereby in each and every particular made the judgment of this the Superior Court;

And it is further considered, ordered and adjudged that, except as covered by the contracts between the Georgia Railway & Power Company and the cities of Decatur and College Park, it is the duty of the said Railroad Commission to fix the fares upon the lines of the railroad of the Georgia Railway & Power Company, and to that end the writ of mandamus is hereby granted requiring the said Commission to take the jurisdiction therein as is directed and required in the opinion of the Supreme Court rendered in the above stated case.

This 26 day of March, 1919.

GEO. L. BELL,  
*Judge S. C. A. C.*

O. K.

JAS. K. HINES,  
*Special Attorney.*

Filed in Office this the 26th day of March, 1919.

W. W. CLARKE,  
*Dpty. Clerk.*

Atlanta, March 15, 1919.

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

GEORGIA RY. & POWER CO.

v.

RAILROAD COMMISSION OF GEORGIA et al.

This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be

irmed in so far as it denies the writ of mandamus requiring the Railroad Commission of Georgia to determine and fix the rate of fare on the line of railway of the Company, plaintiff in error, from the City of College Park to the City of Atlanta, and one line from Decatur to Atlanta, and in so far as it denies the writ requiring the commission to take jurisdiction of the matter of transfers. Except in so far as is above indicated, the judgment of the court below is reversed because the court erred in denying the writ of mandamus. All the Justices concur, except Fish, C. J., dissenting in so far as the judgment is reversed, and Hill, J., dissenting in so far as the judgment is affirmed. Bill of costs, \$10.00.

Supreme Court of the State of Georgia.

Clerk's Office.

Atlanta, March 26, 1919.

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Georgia Ry. & Power Co., paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Z. D. HARRISON,  
*Clerk.*

The foregoing amendment is allowed, subject to demurrer, and is ordered filed. This Nov. 26, 1920.

JOHN B. HUTCHESON,  
*J. S. C., St. Mt. C.*

Filed in Office 26 day of Nov. 1920.

B. F. BURGESS,  
*Clerk.*

286 De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

vs.

GEORGIA RAILWAY & POWER COMPANY and GEORGIA RAILWAY & ELECTRIC COMPANY.

Now comes the complainant in the above stated case and demurs to the answer and cross bill of defendants, Georgia Railway & Power Company and Georgia Railway & Electric Company, filed in this cause and for demurrer, says as follows:

1. Complainant demurs to the allegations in paragraph 28 of said cross bill on the following grounds, to-wit:

(a) It is argumentative.

(b) The statements therein are conclusions without statement of facts upon which said conclusions are based.

(c) The allegations of said paragraph do not set up any legal defense. The legal conclusions as stated therein are not authorized by the facts stated in said paragraph. No facts are alleged in said paragraph to show that said contract was ultra vires or that the consideration of same was illegal or invalid.

(d) Under the facts as shown by the petition, answer and cross bill, said companies are estopped from setting up that said contract is ultra vires; they are also estopped from setting up that the consideration of same is illegal or invalid. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them by said contract, and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than a five cent fare on said North Decatur line, and also give transfers on said line as provided in said contract.

267 2. Complainant demurs to paragraph 30 of said cross bill on the following grounds, to-wit:

(a) The allegations thereof are argumentative.

(b) The allegations are conclusions without any statement of facts to authorize said conclusions.

(c) The allegations in said paragraph set up no legal defense, and no facts are plead to justify the legal conclusions therein stated.

(d) Under the facts as shown by the petition, answer and cross bill, said companies are estopped from setting up that said contract is ultra vires and void. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them by said contract, and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than a five cent fare on said North Decatur line, and also give transfers on said line as provided in said contract.

3. Complainant demurs to the first sentence and also the third sentence of paragraph 30 upon the ground that the allegations thereof are argumentative.

4. Complainant demurs to paragraph 31 of said cross bill on the following grounds, to-wit:

(a) The allegations thereof are argumentative.

(b) The allegations are conclusions without any statement of facts to authorize said conclusions.

(c) The allegations in said paragraph set up no legal defense, and no facts are plead to justify the legal conclusions therein stated.

(d) Under the facts as shown by the petition, answer and cross bill, said companies are estopped from setting up that said contract is ultra vires and void. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them by said contract, and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than a five cent fare on said North Decatur line, and also give transfers on said line as provided in said contract.

5. Complainant demurs to paragraph 32 of said cross bill on the following grounds, to-wit:

(a) The allegations thereof are argumentative.

(b) The allegations are conclusions without any statement of facts to authorize said conclusions.

(c) The allegations in said paragraph set up no legal defense, and no facts are plead to justify the legal conclusions therein stated.

(d) Under the facts as shown by the answer, petition and cross bill, said companies are estopped from setting up that said contract is illegal, unconstitutional and void and cannot be enforced. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and enjoy the benefits, franchises and privileges granted to them by said contract, and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than five cent fare on said North Decatur line, and also give transfers on said line as provided in said contract.

(e) The General Assembly of Georgia by the proviso in the Act of August 23, 1907, as embodied in the Civil Code of Georgia, Section 632, expressly excepted said contract of 1903 made with the town of Decatur from the provisions of the Act then passed, giving the Railroad Commission jurisdiction over street railways, thus refusing to exercise the police power of the State as to the fixing of fares where valid and subsisting contracts existed on August 23, 1907, such as said contract made with the town of Decatur. The validity of said 1903 contract made with the town of Decatur as of the date August 23, 1907, when said Act was passed, is shown by the pleadings. No facts appear in the pleadings in this cause which show that said 1903 contract with the town of Decatur was not valid as of said date August 23, 1907.

6. Complainant demurs to paragraph 33 of said cross bill on the following grounds, to-wit:

(a) The allegations thereof are argumentative.

(b) The allegations are conclusions without any statement of facts to authorize said conclusions.

(c) The allegations in said paragraph set up no legal defense and no facts are plead to justify the legal conclusions therein stated.

(d) Under the facts as shown by the answer, petition and cross bill, said companies are estopped from setting up that said contract is illegal, unconstitutional and void and cannot be enforced. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them by said contract and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than a five cent fare on said North Decatur line, and also give transfers on said line as provided in said contract.

(e) The General Assembly of Georgia by the proviso in the Act of August 23, 1907, as embodied in the Civil Code of Georgia Section 2632, expressly excepted said contract of 1903 made with the town of Decatur from the provisions of the Act then passed, giving the Railroad Commission jurisdiction over street railways, thus refusing to exercise the police power of the State as to the fixing of fares where valid and subsisting contracts existed August 23, 1907, such as said contract made with the town of Decatur. The validity of the said 1903 contract made with the Town of Decatur as of the date August 23, 1907, when said act was passed, is shown by the pleadings. No facts appear in the pleadings in this cause which show that said 1903 contract with the Town of Decatur was not valid as of said date August 23, 1907.

7. Complainant demurs to a portion of paragraph 34 of said cross bill beginning with the sentence—"Defendants say that such contention of petitioner, even if the said so-called contract provision is legal and enforceable, etc.,," and the remainder of said paragraph following said sentence, upon the following grounds, to wit:

(a) The allegations thereof are argumentative.

(b) The allegations are conclusions without any statement of facts to authorize said conclusions.

(c) The allegations in said paragraph set up no legal defense, and no facts are plead to justify the legal conclusions therein stated.

(d) Under the facts as shown by the answer, petition and cross bill, said companies are estopped from setting up that said contract is illegal, invalid and unenforceable. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them by said contract, and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than a five cent fare on said North Decatur line, and also give transfers on said line as provided in said contract.

(e) Complainant demurs to all the allegations of said paragraph which set up that seven cents is charged on other parts of said North Decatur line or other lines of said companies for the reason that said allegations are irrelevant, immaterial and illustrate no issue in this cause.

(f) Complainant demurs to a portion of said paragraph beginning with th sentence—"Defendants say that there is a difference in the feasibility, etc., and the remainder of said sentence and the two sentences following that, upon the ground that the allegations thereof are irrelevant, immaterial, set up no legal defense, and illustrate no issue in this cause.

271 8. Complainant demurs to paragraph 35 of said cross bill upon the following grounds, to-wit:

That the allegations thereof under the admitted facts in these pleadings set up no legal defense and give an incorrect construction to said contract in reference to transfers. Under the admitted facts as shown by the pleadings, it appears that said companies, as well as complainant, its inhabitants and all who have been riding upon said cars, have been furnished transfers upon the payment of a five cent fare and that one full fare has always been construed by said companies and all other parties to mean a five cent fare in reference to transfers.

9. Complainant demurs to the allegations of paragraph 36 of said cross bill upon the following grounds, to-wit:

(a) The allegations thereof are argumentative.

(b) The allegations are conclusions without any statement of facts to authorize said conclusions.

(c) The allegations in said paragraph set up no legal defense, and no facts are plead to justify the legal conclusions therein stated.

(d) Under the facts as shown by the answer, petition and cross bill, said companies are estopped from setting up that said contract is invalid. It appears from the allegations of the petition, answer and cross bill that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them by said contract, and it further appears that said franchises, benefits and privileges were granted to them upon condition that they never charge more than a five cent fare on said North Decatur line, 272 and also give transfers on said line as provided in said contract.

(e) Complainant demurs to the allegations as to the amount paid by passengers on the Stone Mountain line on the ground that said allegations set up no defense, are irrelevant, immaterial and illustrate no issue in this cause.

10. Complainant demurs to the allegations of paragraph 37 of said cross bill upon the following grounds, to-wit:

(a) The allegations set up no legal defense.

(b) Show no reason why said contract should not be enforced.

(c) Under the facts as shown by the pleadings, said companies are estopped from revoking said contract, even if same were revokable (which is denied) as it appears from the pleadings that said companies are now in possession of and now enjoy the benefits, franchises, and privileges granted to them under said contract, and were in possession of same and enjoying them and were exercising the franchises granted under said contract at the time the notice referred to by "Exhibit D" was served on petitioner. It further appears that said line, known as the Atlanta Railway Company, has been taken up and discontinued, and said companies have been enjoying for a period of eighteen (18) years, and now enjoy the privileges conferred from not having to maintain and operate said additional line, and that said companies cannot restore said line and do not propose to restore said line and cannot and do not propose to restore the status that existed between said parties to said contract at the time it was made in 1903. For the reasons stated above and for the reasons that appear in the pleadings in this cause and as shown by said contract with the Town of Decatur made in 1903, it would be unconscionable, inequitable, unjust and illegal to permit said companies to terminate said contract in so far as the obligations

which said companies have assumed thereunder. It appears from the pleadings that the franchises, rights and privileges conferred upon said companies by said contract of 1903 were conferred upon the condition that they never charge a fare upon said North Decatur line of more than five cents, and that transfers be given to passengers as stated in said contract. They cannot now refuse to comply with those conditions by which they are bound and upon which they received said rights, franchises and privileges, which they continue to enjoy.

11. Complainant demurs to the allegations in all of paragraph 38 except the first sentence thereof, upon the following grounds, to-wit:

(a) The allegations set up no legal defense, are irrelevant, immaterial and illustrate no issue in this cause.

(b) The allegations as to what was done by the Railroad Commission on September 22, 1920, in the order marked "Exhibit C" and the portion of said order as set out in said paragraph, are not binding on petitioner.

(c) The statements of said commission as quoted in said paragraph are simply gratuitous remarks of said commission without being based on any finding of fact, and in an inquiry to which petitioner was not a party.

(d) This Court has power only to review findings of said commission when it has upon notice and upon making parties and upon hearing evidence, passed upon rates or a body or rates. This Court cannot, as a primary proposition, inquire into or pass upon any

single rate for the purpose of determining whether or not it is compensatory or unjustly discriminatory.

(e) Said contract of 1903 made with the Town of Decatur as shown by "Exhibit B" attached to petition, was approved by the General Assembly of Georgia in the proviso of the Act of August 23, 1907, and by its subsequent refusal to modify said proviso. The agent and creature of the General Assembly, i. e. the Railroad Commission, has no power or authority and no jurisdiction as to the said contract and no right to inquire into it or to make any declaration concerning it as to its being noncompensatory or discriminatory.

(f) Defendant companies are estopped and have no standing in Court to raise any issue that the rates and the provisions as to transfers as embodied in said contract are not compensatory or discriminatory. It appears from the pleadings that the raise in rates made upon other lines of defendant companies have been upon the motion and upon the request of defendant companies. If any difference in rates now exist, such difference has been brought about at the instance and request of defendant companies. They will not be heard to complain of such difference in rates, and will not be heard to complain that they are discriminatory since these differences have been brought about at the instance and request of defendant companies.

(g) The increase in rates, and thereby the difference in rates between other municipalities, and the rates fixed by said contract with the town of Decatur having been brought about by the Railroad Commission acting as the agent of the Legislature, and the Legislature having approved this contract with the town of Decatur and other municipalities by refusing to take jurisdiction over them when the Act of August 23, 1907 was passed, or by refusing to abrogate them or by refusing to give the Commission jurisdiction thereof, and the Legislature, under the Constitution of Georgia, being supreme in the matter of preventing unjust discrimination, and it being necessary that the Legislature pass an enabling act to put into effect or to enforce the provision in the Constitution of Georgia, giving the Legislature the right to prevent unjust discrimination, 1910 Civil Code, Section 6463, there is no power in this Court to declare this contract with the town of Decatur unjustly discriminatory or to annul it or declare it void for that reason.

275 12. Complainant demurs to the allegations of paragraph 39 of said cross bill upon the following grounds, to-wit:

(a) The allegations set up no defense, are irrelevant, immaterial and illustrate no issue in this cause and show no reason why said contract should not be enforced.

(b) The allegations as to what was done by the Railroad Commission or as to what was said by the Railroad Commission in its order of September 22, 1920, are not binding on petitioner, are irrelevant and immaterial.

(c) The statements of said commission, as quoted in said paragraph, are simply gratuitous remarks of said commission, without being based on any finding of fact and in an inquiry to which petitioner was not a party.

(d) This Court has power only to review findings of said commission when it has upon notice and upon making parties and upon hearing evidence, passed upon rates or a body of rates.

(e) Defendant companies are estopped from claiming the right to terminate said contract by reason of the facts appearing in the petition, answer and cross bill. The alleged changed conditions stated in said paragraph do not give defendant companies the right to repudiate said contract with the town of Decatur.

(f) The allegations as to alleged changed conditions since said contract was made are conclusions without any facts upon which to base the conclusions. The allegations as to alleged changed condition show no reason in law or equity why defendant companies should be permitted to repudiate their obligations under said contract or to revoke or terminate said contract, and all allegations as to alleged changed conditions are irrelevant, immaterial and illustrate no issue in this cause.

(g) The allegations as to the order of the Railroad Commission requiring defendant companies to operate trailers on all schedules during rush hours set up no defense, are irrelevant and immaterial; as a matter of fact, it appears from said contract with the town of Decatur that the Georgia Railway & Electric Company obligated itself to maintain its track in a substantial and safe condition and to operate with cars and rolling stock kept in a safe and comfortable condition; also obligated said company, and said Company represented to said town of Decatur that it could and would give to the citizens of said town of Decatur better street car facilities upon said North Decatur line if the town of Decatur permitted it to take up the parallel line known as the Atlanta Railway Company line.

13. Complainant demurs to the allegations of paragraph 40 of said cross bill upon the following grounds, to-wit:

(a) The allegations of said paragraph set up no defense, are irrelevant, immaterial, and illustrate no issue in this cause, and show no reason why said contract should not be enforced.

(b) The allegations are conclusions without any allegations of facts upon which to base said conclusions.

(c) Defendant companies are estopped from claiming the right to terminate or revoke said contract by reason of the facts appearing in the petition, answer and cross bill. The allegations as to the fare charged on intermediate points between Decatur and Atlanta, and all allegations in said paragraph that said five cent rate to Decatur, as provided in the contract with the town of Decatur, is con-

fiscatory and not compensatory, are irrelevant, immaterial and illustrate no issue in this cause, and show no reason in law or equity why the defendant companies should be permitted to terminate or revoke said contract.

14. Complainant demurs to allegations of paragraph 41 of said cross bill upon the following grounds, to-wit: except that the allegation "at the time of the execution of the so-called contract provision, the same rate of fare was charged on the South Decatur line was was charged on the main or North Decatur line" is not demurred to.

(a) The allegations of said paragraph set up no defense, are irrelevant, immaterial and illustrate no issue in this cause, and show no reason why said contract should not be enforced.

(b) The allegations are conclusions without any allegations of facts upon which to base said conclusions.

(c) Defendant companies are estopped from claiming the right to terminate said contract by reason of the facts appearing in petition, answer and cross bill. The allegations as to the South Decatur line and as to the rate of fare charged on said South Decatur line and as to any difference between the rate on the main or North Decatur line and the South Decatur line, are irrelevant, immaterial and illustrate no issue in this cause.

15. Complainant demurs to the allegations of paragraph 42 of said cross bill upon the following grounds, to-wit:

(a) The allegations of said paragraph set up no defense, are irrelevant, immaterial and illustrate no issue in this cause, and show no reason why said contract should not be enforced.

(b) The allegations are conclusions without any allegations of fact upon which to base said conclusions.

(c) Defendant companies are estopped from claiming that said contract is ultra vires or void because of the facts appearing in petition, answer and cross bill.

(d) No facts are shown in said paragraph which authorize the conclusion that said contract with the Town of Decatur is in violation of any of the sections of the Constitution of Georgia, mentioned in said paragraph, and no reasons in law or equity are shown why said contract with the town of Decatur is unconstitutional and void.

16. Complainant demurs to the allegations of paragraph 43 of said cross bill, except the allegations that "The State of Georgia had not taken jurisdiction over said line, and that the fare over all lines of defendant companies had been until 1919, five cents," upon the following grounds, to-wit:

(a) The allegations of said paragraph set up no defense, are irrelevant, immaterial and illustrate no issue in this cause, and show no reason why said contract should not be enforced.

(b) The allegations are conclusions without any allegations of facts upon which to base said conclusions.

(c) All allegations as to what rate of fare the Railroad Commission of Georgia fixed on other lines of defendant companies other than said Main Decatur line from the town of Decatur to Atlanta, and vice versa, are irrelevant, immaterial and illustrate no issue in this cause.

(d) All allegations as to what said Railroad Commission did after the decision of the Supreme Court of Georgia in the case of the Georgia Railway & Power Company vs. the Railroad Commission of Georgia, are irrelevant, immaterial and illustrate no issue in this cause.

(e) It appears from the pleadings in this case that the State has never exercised its police power on said North Decatur line as to fares and transfers from Decatur to Atlanta, and vice versa, as covered by said contract with the town of Decatur. The Supreme Court of Georgia, in the decision referred to in said paragraph, expressly held that said contract with the town of Decatur was valid and held that because of the proviso in the Act of August 23, 1907, the Railroad Commission had no jurisdiction over fares and transfers from Decatur to Atlanta, and vice versa, because of said contract. The Railroad Commission, since this decision, has very properly refused to take any jurisdiction over rates and transfers from the town of

Decatur to Atlanta, and vice versa. Nothing that has been  
279 done either by the Railroad Commission or the State of Georgia acting through the General Assembly, has been in conflict with or has affected in any way said contract with the town of Decatur.

17. Complainant demurs to paragraph 44 of said cross bill upon the following grounds, to-wit:

(a) The allegations of said paragraph set up no defense.

(b) They are erroneous conclusions of law without any facts upon which to base said conclusions.

(c) This Court can only act as a Court of review and has no right as a primary proposition to inquire into, hear evidence on, and no power to declare any rate or body of rates non compensatory, discriminatory or unenforceable.

(d) Defendant companies are estopped by reason of the facts appearing in the petition, answer and cross bill from claiming that said contract is illegal, void or unenforceable.

18. Complainant demurs to the allegations of paragraph 45 of said cross bill upon the following grounds, to-wit:

(a) The allegations set up no defense, are irrelevant, immaterial and illustrate no issue in this case.

(b) They are erroneous conclusions of law without any facts upon which to base said conclusions.

(c) Defendant companies are estopped from claiming that said contract is null and void by reason of the facts which appear in these pleadings.

(d) This Court in the matter of discrimination can act only as a review Court and has no power as a primary proposition to inquire into and hear evidence on any alleged discrimination.

(e) All allegations of said paragraph as to rates charged on other lines of defendant companies are irrelevant, immaterial and 280 illustrate no issue in this cause.

(f) No facts are shown in said paragraph which would authorize the conclusion that said contract is in violation of any section of the Constitution of Georgia. No section of said Constitution is distinctly referred to in said paragraph, and the allegations of said paragraph show no reason why said contract should be declared unconstitutional, null and void.

19. Complainant demurs to the allegations of paragraph 46 of said cross bill upon the following grounds, to-wit:

(a) The allegations thereof set up no defense and show no reason in law or equity why said contract should not be enforced.

(b) Said allegations are simply erroneous conclusions of law without any facts being plead upon which to base said conclusions.

(c) All allegations as to rates of fare on other lines of said companies, or the difference in the rates upon other lines of said companies and said North Decatur line, are demurred to as irrelevant, immaterial and illustrating no issue in this cause.

(d) Defendant companies are estopped from claiming that said contract is discriminatory or illegal by reason of the facts appearing in these pleadings, and by reason of the franchises, benefits and privileges, which defendant companies have received and now enjoy under the terms of said contract with the town of Decatur.

(e) This Court can only act as a Court of review in reference to the fixing of rates, and has no power as a primary proposition to inquire into, hear evidence on, or determine rates.

21. Complainant demurs to paragraph 47 of said cross bill upon the following grounds, to-wit:

(a) The allegations set up no defense, are irrelevant, immaterial, and illustrate no issue in this cause, and are simply conclusions of law without any facts being plead upon which to base them.

(b) The allegations as to the rates of fare on other lines of defendant companies are irrelevant and immaterial.

22. Complainant demurs to the allegations of paragraph 48 of said cross bill upon the following grounds, to-wit:

(a) Said allegations set up no defense, are irrelevant, immaterial and illustrate no issue in this cause and are conclusions without any facts being placed upon which to base said conclusions.

(b) No facts are plead which show that said contract is in violation of any of the provisions of the Constitution of the State of Georgia referred to in said paragraph.

(c) The enforcement of Section 6463 of the Constitution of Georgia referring to unjust discrimination is lodged in the General Assembly of Georgia, and it does not appear that the General Assembly has, by any act, declared that said contract with the town of Decatur, is unjustly discriminatory, or has in any way taken jurisdiction over said contract, or given to any agent or tribunal any right, power or authority to declare said contract unjustly discriminatory. On the contrary, the General Assembly has, by the proviso in the act of August 23, 1907, heretofore referred to, distinctly approved said contract as a valid contract.

(d) The last sentence of said paragraph is demurred to upon the ground that it does not appear therein what acts of the General Assembly of Georgia are referred to. No laws and no acts of the Legislature of Georgia are set out which render said contract with the town of Decatur discriminatory, illegal or void, and it is not alleged or shown what laws said contract is in conflict with.

282 23. Complainant demurs to the allegations of paragraph 49 of said cross bill upon the following grounds, to-wit:

(a) The allegations in reference to any order of the Railroad Commission are irrelevant, immaterial and illustrate no issue in this cause. Said allegations are conclusions without any statement of facts authorizing said conclusions.

(b) Complainant demurs to the allegations of said paragraph upon the grounds as heretofore stated in the demurrer to paragraph 44 of said cross bill.

24. Complainant demurs to the allegations of paragraphs 50, 51 and 52 of said cross bill upon the following grounds, to-wit:

(a) All allegations in said paragraphs as to any acts of the Railroad Commission of Georgia, or any orders of the Railroad Commission of Georgia in reference to the fixing and regulation of service on said main Decatur line or in reference to the main Decatur traffic, or upon any other lines of defendant companies, are demurred to as irrelevant, immaterial and illustrating no issue in this cause, and setting up no reasons in law or equity why said contract with the town of Decatur is either confiscatory, illegal, unconstitutional or void, or why said contract should not be enforced.

(b) Any act or any order of the Railroad Commission in the regulation of service or otherwise, is subject to review by the Courts if said acts or orders of the Railroad Commission are confiscatory, or if said acts or orders of the Railroad Commission are illegal or unconstitutional or void. It does not appear that said companies have made any effort to review the acts and orders of the Railroad Commission referred to in paragraphs 50, 51 and 52. This Court has power only in reference to rates as to whether they are non-compensatory 283 or confiscatory or discriminatory to act as a reviewing Court, and this Court has not the power, as a primary proposition, to inquire into, hear evidence upon, and pass upon any question in reference to the fixing of rates or the regulation of rates.

(c) It further appearing that defendant companies, by the contract which they have made with the town of Decatur, represented to said town, and in consideration of the franchises, benefits and privileges conferred upon them by said contract, that said Electric Company could and would give to the citizens of said town of Decatur better street car facilities upon another parallel line street railway between the city of Atlanta and the town of Decatur, owned by said company, known as the Rapid Transit Line, now known as the main or North Decatur line, and that said company obligated itself to operate said line with cars and rolling stock kept in a safe and comfortable condition.

(d) Defendant companies are estopped from claiming that said contract should not be enforced for any of the reasons alleged in said paragraphs 50, 51 and 52 of said cross bill for the reasons heretofore stated in this demurrer, viz, that they have under said contract with the town of Decatur, received benefits, franchises and privileges which they are now in possession of and now enjoy, and for these reasons and other facts appearing in these pleadings, they cannot now complain of and cannot repudiate the obligations which they have assumed under the contract with the said town of Decatur.

(e) The allegations of said paragraphs are simply conclusions without statement of any facts to authorize said conclusions.

(f) The allegations of said paragraphs set up no defense, are irrelevant, immaterial and illustrate no issue in this cause.

(g) No facts or any good reason in law or equity are shown why said contract with the town of Decatur is in *violative* of any 284 of the constitutional provisions referred to in said paragraphs.

(h) All allegations of said paragraphs as to the cost per passenger on said main Decatur line from Atlanta to Decatur, and vice versa or the cost per passenger upon any other lines of the defendant companies, are demurred to as irrelevant, immaterial and illustrating no issue in this cause.

25. Complainant demurs to the allegations of paragraph 52 of said cross bill upon the ground that no reasons in law or equity are stated, and no facts are plead which would authorize the conclusions

that the Act of 1907, referred to in said paragraph, is now confiscatory, unconstitutional, and void.

(d) Defendant companies are concluded on this question by decision of the Supreme Court of Georgia, heretofore referred to in the case of the Georgia Railway & Power Company vs. the Rail Commission of Georgia, reported in 149th Georgia, page 1. In said proceedings, defendant power company attacked said act of 1907 as unconstitutional and void, and also attacked the validity of said contract of 1903 with the town of Decatur, as appears from the pleadings in said mandamus case attached to and forming a part of the pleadings in this case. All the questions, therefore, in reference to the constitutionality of said Act of 1907 and the validity of said contract with the town of Decatur are res adjudicata as to the defendant in this case.

(c) The allegations of said paragraph 52, as set out, raise no constitutional questions in reference to said Act of 1907, or the provisions contained therein.

26. Complainant demurs to the allegations of paragraph 53 of said cross bill upon the following grounds, to-wit:

(a) No reasons in law or equity are stated, and no facts are presented which would authorize the conclusion that the Act of 1907 referred to in said paragraph, is now confiscatory, unconstitutional, and void.

(d) Defendant companies are concluded on this question by decision of the Supreme Court of Georgia, heretofore referred to in the case of the Georgia Railway & Power Company vs. the Rail Commission of Georgia, reported in 149th Georgia, page 1. In said proceedings, defendant power company attacked said Act of 1907 as unconstitutional and void, and also attacked the validity of said contract of 1903 with the town of Decatur, as appears from the pleadings in said mandamus case attached to and forming a part of the pleadings in this case. All the questions, therefore, in reference to the constitutionality of said Act of 1907 and the validity of said contract with the town of Decatur are res adjudicata as to the defendant in this case.

(c) The allegations of said paragraph 53, as set out, raise no constitutional questions in reference to said Act of 1907, or the provisions contained therein.

(d) The right to declare any rate fixed by contract unjustly discriminatory or to take jurisdiction over any such question is lodged in the General Assembly of Georgia. The General Assembly has absolute power in the matter of exercising police power in the fixing of rates.

27. Complainant demurs to paragraphs 53 and 54 of said cross bill upon the following grounds, to-wit:

(a) The allegations set up no defense, are irrelevant, immaterial and illustrate no issue in this cause, and are conclusions without any statement of facts upon which to base said conclusions.

(b) All allegations in said paragraphs as to the acts of the Railroad Commission and fixing rates upon other lines of defendant companies, are demurred to as irrelevant and immaterial.

(c) All allegations in said paragraphs as to the cost to defendant companies in performing the service of hauling passengers on their lines or on the main or North Decatur line from Decatur to Atlanta and vice versa, and the cost of hauling passengers on said North Decatur line from Decatur to Atlanta, and vice versa, and giving transfers, are demurred to as irrelevant, immaterial and illustrating no issue in this cause.

(d) Defendant companies show no facts and no right in law or equity to repudiate said contract with the town of Decatur.

(e) It does not appear that defendant companies offered to restore the status of the parties to said contract at the time said contract was made in 1903. Defendant companies do not offer to restore and can not restore the line of the Atlanta Railway Company which existed at that time, and which has been discontinued.

(f) Defendant companies cannot relieve themselves from the solemn binding contract by any offer to restore the franchises, benefits and privileges which accrued to them by the terms of said contract, even if it were in their power to make such restoration.

(g) It appears from the pleadings in this case that the town of Decatur has increased in population, and that its citizens have built and acquired property rights on the faith of this contract for the operation of said North Decatur line. Defendant companies cannot now, by an attempt at repudiation, deprive said town of Decatur and its inhabitants of their rights under this contract, because forsooth may for a time be unprofitable.

28. Complainant demurs to the allegations of paragraph 14 of said answer, in reference to the holding of an order of the railroad commission as to fares on said Decatur line, as being irrelevant, immaterial and illustrating no issue in this cause.

29. Complainant demurs generally to the said cross bill upon the following grounds, to wit, and as shown in paragraphs 30, 31, 32, 33, 34, 35 & 36.

(a) The allegations of said cross bill set up no defense in law or equity, and show no reason why said contract with the town of Decatur should not be enforced.

(b) The allegations of said cross bill are simply conclusions without statements of any facts to authorize or justify said conclusions of

(c) Defendant companies are estopped from terminating or revoking said contract, or attempting to terminate or revoke same as it appears from the pleadings that said companies are now in possession of and now enjoy the benefits, franchises and privileges granted to them under said contract. It further appears that the line known as the Atlanta Railway Company has been taken up and discontinued for a period of eighteen (18) years, and that said companies no longer enjoy the privileges conferred from not having to maintain and operate said additional line, and that said companies cannot restore said line and do not propose to restore said line and cannot and do not propose to restore the status that existed between said parties to said contract at the time it was made in 1903.

(d) It further appears from the pleadings in this case that the questions which defendant companies now seek to raise in this cross bill have been adjudicated and determined by the decision of the Supreme Court of Georgia in the said mandamus case of the Georgia Railway & Power Company v. The Railroad Commission, and that all questions now sought to be raised are res adjudicata.

30. That this court does not possess the power, either in law or in equity, to make a primary investigation into the reasonableness or unreasonableness of defendant's rate of charges; that the exclusive

power to declare what is a just and reasonable rate of transportation has been vested in the railroad commission of Georgia. That the only power of the courts over reasonableness of rates is in reviewing the legality of orders of the railroad commission in fixing just and reasonable rates of charges; that the railroad commission has been given exclusive jurisdiction in the matter of fixing rates; that while courts of equity have full right of review of such orders of the railroad commission, with full power to enjoin an order allowing confiscatory rates, or rates granted illegally and without due process of law, and rates which when enforced would result in the taking of private property for public use without just compensation, they have not the power nor have they heretofore or now assumed the power primarily to fix and regulate the rates of public utilities.

31. That it appears from the cross bill that the rate fixed as to College Park and Decatur were only a part of a general body of rates, a schedule of rates affecting defendant's entire system of street railway, including its system of electric lighting; that it thus appears that the College Park and Decatur rate was fixed in connection with the general body of rates this court does not have the power, nor would it seem to be the inclination of a court of equity to segregate the Decatur rate from the rest of the rates authorized by the commission in connection with the general body of rates granted on defendant's entire system; that the correctness and validity of the order of the railroad commission in approving this general body of rates can only be supervised and reviewed by a full consideration of the whole body of rates fixed by the commission and in full purview of all the facts and circumstances upon which its order was predicated; that

no sufficient facts are set forth in the cross bill to show or convince  
that the Decatur rate is unreasonable, unjust, non-compensatory,  
or confiscatory; that so far as the facts alleged are con-  
cerned it may be well concluded that any alleged loss or service  
below cost was cared for by the commission in the allowance  
of the remaining parts of said general body of rates; that defendants  
have no standing in court to attack any rate, particularly the rate  
fixed on the said North Decatur line, as being discriminatory; that  
said defendants are in no wise concerned with questions of dis-  
criminations, except so far as their own rights are concerned with the  
rights of other like public utilities; that the fact that a certain rate  
granted to the public, as to a certain line of street railways, is dis-  
crimatory as to the public affected by other rates of other parts of  
the general system, only gives a right to the members of the latter  
public to complain; and that the defendant has no standing in  
court to raise this question; the only concern it has is to see that the  
general body of rates prescribed for it by the commission is granted  
under due process of law and does not have the effect of taking its  
property without just compensation.

32. That it appears from said cross bill that the rate upon the  
North Decatur line, against which its complaint is aimed, has not  
been attacked in any court heretofore, moreover it appears that the  
general body of rates on all other lines than those of Decatur and  
College Park, have since the fixing of the rate complained of been  
again increased so that the same now is seven cents, an addition of  
one cent per passenger over the rate fixed in the body of the rates,  
part of which is complained of; and that to review or supervise  
that rate fixed for the College Park line and the North Decatur line  
would require in addition to the facts disclosed upon the former  
hearing of the railroad commission the facts disclosed upon the latter  
hearing; that it appears that instead of attacking the six cent  
body of rates or any part thereof, the said defendants have put  
in operation and kept in operation the rates therein pre-  
scribed, until the seven cent body — rates was put in  
operation under the latter order of the railroad commission;  
that being true the said defendants have been guilty of such  
aches and have altered the facts and circumstances consid-  
ered by the railroad commission in the hearing of the six cent  
body of rates in such manner as to preclude any effort on the part  
of the court or of any other court to pass upon the correctness and  
legality of the order of the railroad commission fixing the six cent  
body of rates.

33. That the facts set forth in the said cross bill do not lead to the  
conclusions that the general body of rates fixed either in the order  
or the six cent body of rates or the seven cent body of rates do not  
allow defendants a sufficient and legal and constitutional return  
upon the value of their properties devoted to the public use through-  
out their entire system of public utilities; that they do not show by  
any facts alleged that either of said bodies of rates are non-com-  
pensatory or confiscatory; that they show no reason why they should

have in addition to the net returns accruing to their revenue from the application of either the six cent body of rates, including the College Park and North Decatur rate, or the seven cent body of rates, including the College Park and North Decatur rate, the additional revenue which would accrue to them by increasing the College Park and North Decatur rate from that fixed by the commission, as well as by their contract, to a rate of seven cents per passenger; that the presumption is that the granting of both of said bodies of rates under the facts and circumstances considered by the commission allowed them sufficient and legal return upon the property devoted to the public use throughout their entire system, and they allege 291 no facts showing that such presumption is not now conclusive.

34. That if any effort is made by the defendants to arrest the full operation of the College Park and North Decatur rates, as fixed by the commission and by their contracts, such effort can only predominate by bringing to the attention of this court all of the facts and circumstances which go to make up the rates on their entire system; that no such facts are alleged in the cross bill and the same is insufficient to the granting of the relief therein prayed.

35. That in said cross bill no effort whatsoever is made to lay before this court the facts and circumstances which induced the commission in the making of the six cent body of rates, including the North Decatur rate, so as to permit this court to supervise or review the correctness of said order of the commission.

36. That this court has no inherent jurisdiction to pass upon the primary question of the reasonableness or unreasonableness of rates, this being a question of fact over which only the jurisdiction of the railroad commission — under the statutes of this State; that the only inherent power possessed by this court under the statutes and laws of this State, with reference to rates, is a question of law, to wit, whether the order of the railroad commission fixing certain rates is illegal, in that it is confiscatory and non-compensatory; that no such question is presented to this court by the facts disclosed by the cross bill; the same being only an effort to have this court pass upon the reasonableness of rates as a primary proposition involving only a question of fact and of discretion, and complainant respectfully contends to the court that it has no such power.

Wherefore, it prays the judgment of the court and that said 292 cross bill be stricken; and all allegations of the answer as to reasonableness and discrimination be stricken.

Complainant, therefore, prays that this demurrer be sustained, and that all the allegations in paragraphs of said cross bill and answer which are demurred to be stricken, and that said cross bill be dismissed or stricken.

L. J. STEELE,  
GREEN, TILSON & MCKINNEY,  
FRANK HARWELL,  
*Petitioner's Attorneys.*

Filed in office 26 day of November, 1920.

B. F. BURGESS,  
*Clerk.*

Upon considering plaintiff's several demurrers to defendants' answer and cross bill and to defendants' amendment to said answer and cross bill, the same are sustained upon each and every ground of general demurrer therein contained and the said answer and cross bill and said amendments thereto are hereby stricken and dismissed, except, only in so far as said answer contains specific denials or admissions of allegations in the original petition of plaintiff, or states that for lack of information defendants neither admit nor deny the allegations of the petition.

The special grounds of said demurrers are not now passed on.

In open court, this December 10, 1921.

JOHN B. HUTCHESON,  
*Judge Supr. Ct., St. Mt. Circuit.*

De Kalb Superior Court.

No. 2497.

TOWN OF DEACTUR

v.

GEORGIA RAILWAY & POWER COMPANY & GEORGIA RAILWAY & ELECTRIC COMPANY et al.

Now comes the petitioner in the above stated case and demurs to amendment to the answer and cross bill of defendants filed on the 7th day of Nov. 1921, and for demurrer says as follows:

1. Petitioner renews its demurrers heretofore filed to defendants' answer and cross bill and demurs to said amendment upon each and every ground thereof and says that each and all of said grounds of demurrer equally apply to said amendment.
2. The allegations of said amendment set forth no defense in law or equity and show no reason why said contract with the town of Decatur should not be enforced and set forth no sufficient grounds in law or equity to authorize the relief prayed for in defendants' cross bill.
3. The allegations of said amendment are irrelevant, immaterial and illustrate no issue in this cause, and are conclusions without any statement of facts upon which to base said conclusions.
4. No facts are plead and no good reasons in law or equity are shown why said contract with the town of Decatur is in violation of any of the constitutional provisions, either State or Federal, referred to in said amendment.

5. That defendant companies are concluded on all the questions raised in said amendment by the decision of the Supreme Court of Georgia in the case of the Georgia Railway & Power Company v. Railroad Commission of Georgia, reported in 149 Ga. 1, and are also concluded on all questions sought to be raised in said amendment by decision of this court and affirmed by decision of this court and affirmed by decision of the Supreme Court of Georgia in the instant case on the grant of an interlocutory injunction.

294 6. It is not shown in said amendment how or in what way the acts referred to of August 17th, 1914 and of August 19th, 1916, contravene article 1, section 10, of the constitution of the United States. It is not shown how or in what manner the said acts impair the obligations of any contract or of what contract.

7. The contract set out provides for a maximum rate of five cents from the town of Decatur to the city of Atlanta and vice versa, and this court and the Supreme Court of Georgia, by decisions rendered heretofore in the case above referred to in paragraph 5 and in the instant case have properly construed the rate provision therein to mean the town of Decatur as subsequently extended. The allegations of the amendment and cross bill show that defendants also placed the same construction on said contract. Defendants therefore having contracted are bound thereby and must abide by their contract.

8. Petitioners demur especially to paragraph 20 of said amendment in that it is not shown how or in what way the acts referred to therein impair the obligation of any contract with the county of De Kalb; nor is the county of De Kalb a party to this cause, and all allegations with reference thereto are utterly irrelevant and immaterial and illustrate no issue in this cause.

9. Petitioner demurs to paragraph 21 of said amendment in that it is not shown how or in what way said act of 1907 referred to, contravenes article 1, section 10, of the constitution of the United States; it is now shown how or in what way said act impairs the contract referred to; to the contrary said act preserves valid, subsisting contracts of street railway companies with municipalities.

10. Petitioner demurs to paragraph 22 of said amendment in that it is not shown how or in what way said orders referred to impair the obligations of any part of the contract referred to; how said orders contravene article 1, section 10, of the constitution of the United States, nor are said alleged orders set forth in said amendment.

11. Petitioner demurs to paragraphs 26, 27 and 28 of said amendment in that it is not shown how or in what manner the contract with the town of Decatur violates the paragraphs of the constitution of the State of Georgia therein set forth.

12. The alleged violation of the constitutional provisions of the State of Georgia set forth in paragraphs 26, 27 and 28 of said amendment has been settled adversely to defendants by the decision of the

Supreme Court of Georgia in the decision referred to in paragraph 5 of this demurrer and also in the instant case, and this interpretation of the contract with the town of Decatur with reference to the constitutionality thereof must be and will be accepted by all courts as the law of this case.

13. The contract referred to in said amendment with the town of Decatur being a valid subsisting contract, as already decided by the Supreme Court of Georgia, all allegations that said contract is confiscatory and in violation of the 14th amendment of the constitution of the United States are utterly without any merit and set up no defense in law or equity, and show no legal reason why the contract with the town of Decatur should not be enforced.

14. Petitioner demurs to paragraphs 30 and 31 in that said orders of the commission are not set out and it is not pointed out how or in what manner they contravene article 1, section 10, of the constitution of the U. S. or in what way they impair any portion of said contract with the town of Decatur; furthermore, it is not shown how said orders, if invalid, give the defendants any right to repudiate their contract with the town of Decatur and no legal reason 296 appears why said contract of the town of Decatur with defendants should not be enforced.

Wherefore petitioner prays that the foregoing demurrer be sustained and that said amendment be stricken.

J. HOWELL GREEN,  
HARWELL, FAIRMAN & BARRETT,  
*Attorneys for Town of Decatur.*

Filed in office Dec. 10, 1921.

B. F. BURGESSION,  
*Clerk.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY & GEORGIA RAILWAY & ELECTRIC COMPANY et al.

Defendants having filed an amendment to their answer and cross bill, now comes petitioner and demurs to the answer and cross bill of defendants as amended upon the following grounds, to wit:

1. Petitioner renews its demurrers heretofore filed to said answer and cross bill of defendants upon each and every ground thereof and says that each and every ground of said demurrers equally apply to said answer and cross bill as amended.

2. The allegations thereof are conclusions without any statement of facts to authorize said conclusions.

3. The allegations thereof set up no defense, are irrelevant and immaterial and illustrate no issue in this cause.

4. The allegations thereof set up no defense in law or equity and show no reason why said contract with the town of Decatur should not be enforced and show no sufficient grounds in law or equity for the relief prayed for.

297 5. The allegations thereof show no facts in law or equity to authorize defendants to repudiate said contract with the town of Decatur.

6. No reason in law or equity are stated and no facts are plead which would authorize the conclusion that said contract with the town of Decatur is in violation of any of the constitutional provisions, either State or Federal, referred to therein.

7. Defendant companies are estopped from claiming that said contract with the town of Decatur should not be enforced.

8. Defendants are concluded on all of the questions sought to be raised therein by the decision of the Supreme Court of Georgia in the case of Georgia Railway & Power Company v. Railroad Commission of Georgia, reported in 149 Ga. 1; also by decision of this court and affirmed by the Supreme Court of Georgia in the instant case, and said decision of the Supreme Court has become the law of this case.

9. Petitioner demurs to the last sentence in paragraph 3 of the original answer, to wit, "defendants say that the Georgia Railway & Electric Company ceased to operate most of said lines prior to December, 1902," for the reason that said allegation is irrelevant and immaterial and sets up no defense.

10. Petitioner demurs to the last portion of paragraph 6 of the original answer, to wit, "a portion of said line having been abandoned," for the reason that said allegation is irrelevant and immaterial and sets forth no defense.

11. Petitioner demurs to the last sentence of paragraph 14 of the original answer for the reason that the allegations thereof are irrelevant and immaterial and set forth no defense.

298 Wherefore petitioner prays that this demurrer be sustained and that said entire cross bill as amended be stricken and that the portions of said answer which are demurred to be stricken.

J. HOWELL GREEN,  
HARWELL, FAIRMAN & BARRETT,  
*Attorneys for Town of Decatur.*

Filed in office Dec. 10, 1921.

B. F. BURGESS,  
*Clerk.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY & GEORGIA RAILWAY & ELECTRIC COMPANY et al.

Now comes the petitioner in the above stated case and demurs to the amendment to the answer of defendants filed on the 10 day of Dec. 1921 and for demurrer says as follows:

1. Petitioner renews its demurrer heretofore filed to defendants' answer and cross bill and to the amendment thereto heretofore filed and demurs to said amendment filed on the 10 day of Dec. 1921 upon each and every ground thereof and says that each and all of said grounds of demurrer equally apply to said amendment filed Dec. 10, 1921.
2. The allegations of said amendment set forth no defense in law or equity and show no reason why said contract with the Town of Decatur should not be enforced and sets forth no sufficient grounds in law or equity to authorize the relief prayed for in defendants' cross bill.
3. The allegations of said amendment are irrelevant, immaterial and illustrate no issue in this cause and are conclusions without any statement of facts upon which to base said conclusions. No facts are plead and no reasons in law or equity are shown why the 299 said acts extending the corporate limits of the town of Decatur are in violation of any constitutional provision either State or Federal.
4. It is not shown in said amendment how or in what way the acts referred to extending the corporate limits of the town of Decatur are unconstitutional or how or in what way said acts contravene any article or section of the constitution of Georgia or of the United States.

Wherefore petitioner prays that the foregoing demurrer be sustained and said amendment be stricken.

J. HOWELL GREEN,  
HARWELL, FAIRMAN & BARRETT,  
*Attorneys for Town of Decatur.*

Filed in office Dec. 10, 1921.

B. F. BURGESS,  
*Clerk.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY & GEORGIA RAILWAY &  
ELECTRIC COMPANY et al.

Now comes the petitioner in the above stated case, defendant having amended, and demurs to and moves to strike and to dismiss the cross bill and answer of the intervenors in said case because:

1. The allegations thereof set up no defense in law or equity and show no reason why the said contract with the town of Decatur should not be enforced, and no sufficient grounds in law or equity are set forth authorizing the relief prayed for.
2. The allegations thereof are conclusions of law without any statement of facts upon which to base said conclusions.
3. The allegations thereof are immaterial and irrelevant and illustrate no issue in this cause.
4. Petitioner renews its demurrers to said cross bill of the intervenors in said case as heretofore filed upon each and every ground thereof.

Wherefore petitioner prays that said cross bill of the intervenors in this case be dismissed or stricken.

J. HOWELL GREEN,  
HARWELL, FAIRMAN & BARRETT,  
*Attorneys for Town of Decatur.*

Filed in office Dec. 10, 1921.

B. F. BURGESS,

*Clerk.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY AND GEORGIA RAILWAY &  
ELECTRIC COMPANY.

Now comes the complainant in the above stated case, and for plaintiff to the intervention of R. C. Hackman et al., in said case, and without waiving its demurrer to the said intervention, heretofore filed in said case, says as follows:

1. That this complainant is informed, believes and so charges that the city of Atlanta, one of the localities in which some of the said intervenors reside, has a contract with the Georgia Railway and Electric Company, one of the above defendants, a franchise contract entered into on or about the year 1902, whereby the said electric company agreed, as a part of the consideration for the said franchise to pay on the first day of February of each and every year during the operation of said franchise, as follows: one per cent. of the gross income of the said electric company in and around Atlanta, for three years immediately following the year 1902; two per cent. of said gross income for the next twenty years, and three per cent. of

301 the said gross income for the balance of the duration of the said franchise; that in addition the said city of Atlanta has a franchise-contract made at the same time which entitles to free transfers, upon the payment of one full fare; that it furthermore has a contract which requires the said Georgia Railway & Electric Company to pay the full amount of the cost of the pavement for fifteen feet on those streets where there are double tracks of railway, and eleven feet where there are single tracks, when said pavement is done under the assessment plan.

2. That the complainant is informed, believes and so charges that if the franchise contract of this complainant which gives the right to a five cents fare to and from Decatur is invalid because discriminatory, as to said localities or either of them, then each and every of the other franchise-contracts set forth for the city of Atlanta is invalid for the same reason; because if the Decatur contract discriminates against them, then the other contracts discriminate against the said locality and town of Decatur, and affects the regulation of fares and service.

3. That the said intervenors are each and all without equity in said intervention; and the said intervention as to each and all of said intervenors is without equity, in that they show no effort or willingness to bring in the franchise contracts of their own localities, in order that the same may be surrendered and cancelled by this court of equity on the ground that the same are now invalid and unenforceable because discriminatory against the locality and town of Decatur.

4. That the said intervenors and each of them does not come into this court of equity with clean hands; that they come into court for the purpose of striking down the rights of a city and a State in a franchise-contract which they say discriminates against them and

302 the locality and city in which they reside, and yet hold to their bosoms franchise-contracts just as amenable to attack on the same grounds; and yet show no effort or disposition to surrender their franchise-contracts; and show no facts to the effect that they have made any effort to have the constituted authorities of the said cities file such an intervention for the protection of their locality and city, and to bring into this court of equity the above mentioned franchise-contracts; and that without such showing they come into

this court of conscience with unclean hands, with admittedly unclean hands; and are therefore without equity.

5. That the constituted authorities of the said localities and cities do not see fit officially to intervene in said cause for the purpose of attacking the said franchise-contract of the town of Decatur, on the ground that the same discriminates against their city or locality; and that for that reason the said intervenors have no standing in court because they and each of them are powerless to do equity in the premises.

6. That the only equity that could properly, under the facts of this plea, be offered by the intervenors and each of them, or by the authorities of the localities and cities above mentioned, would be a surrender of their said franchises-contracts for cancellation on the ground that they discriminate against the said locality and town of Decatur.

7. That neither of them has done this, nor have they shown any effort or disposition to do so, nor have they or either of them shown any facts to excuse them from so doing; nor have they shown any effort to get the constituted authorities of the said localities and cities to do so for them and for their cities and localities.

Wherefore, the complainant pleads the above and foregoing facts of this plea in bar and abatement of the said intervention and  
303 of all rights and remedies therein claimed or prayed.

L. J. STEELE,  
GREEN, TILSON AND McKINNEY,  
FRANK HARWELL,  
*Petitioner's Attorney.*

GEORGIA,

*De Kalb County:*

In person before the undersigned authority came L. J. Steele, Mayor of the Town of Decatur, who being sworn, deposes and says that the facts set forth in the above and foregoing plea are true.

L. J. STEELE.

Sworn to and subscribed before me this the 26th day of November, 1920.

B. F. BURGESS,  
*Clerk Superior Court, De Kalb County, Ga.*

Filed in office 26 day of November, 1920.

B. F. BURGESS,  
*Clerk.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY and GEORGIA RAILWAY & ELECTRIC COMPANY.

And now comes the complainant in the above stated case and demurs to the intervention of R. C. Hackman et al., filed in this cause, and for demurrer says as follows:

(1) That it adopts each and every demurrer filed in this cause to the answer of the above named defendant companies; and hereby alleges that each and all of said grounds of demurrer equally apply to the said intervention; that the said intervenors and each of them have no standing in court to question the reasonableness of the general body of rates fixed, as in said demurrer set forth; that they and each of them have no standing in court to question the five 304 cents rate to and from Decatur or the transfer provisions in said contract with the town of Decatur on the ground that the same is either unreasonable or discriminatory; that the facts set forth in said intervention do not show that they have the right to the remedy prayed for in said intervention.

(2) That the matter set forth in said intervention is not germane to the matter set forth in the complaint and answer thereto; that the same undertakes to raise an outside issue between the complainant and intervenors, to wit, that the said five cents rate is discriminatory; that no such issue could have properly and legally have been raised between the original parties in the case; and the said intervention is theretofore multifarious and will not be allowed.

(3) That the facts set forth in the said intervention do not entitle the said intervenors to the relief sought, nor to any relief at all; and do not constitute a cause of action in said intervenors which give them an affirmative right to intervene in said cause.

(4) Said intervenors are strangers to the pending cause and it is not shown that it is necessary to their protection that they be allowed to become parties in this case; no reason in law or equity is shown why they should be made parties.

(5) If intervenors have any right in law or equity to attack said contract with the town of Decatur as invalid or unenforceable they must proceed in separate suit for that purpose.

(6) The intervention, if allowed, would be a misjoinder of parties defendant and misjoinder of causes of action.

(7) Said intervenors are not parties to the contract with the Town of Decatur which is sought to be enforced.

305 (8) All allegations with reference to rates upon other lines of defendant companies, or any differences in rates between said North Decatur line and other lines of defendant companies or any difference in rates from other municipalities or places and the Town of Decatur are demurred to, as irrelevant, immaterial and illustrating no issue in this cause.

(9) The allegations of said intervention are simply conclusion without any statement of facts upon which to base said conclusion.

(10) It is not shown that the alleged differences in rates existed at the time said contract was made. If any differences now exist as alleged it had been as it appears at the instance and request of the Georgia Railway & Power Company through the R. R. Commission in having the rate raised on other lines of said company or companies to said municipalities where intervenors live. It was the duty of intervenors to appear before the commission and object to the raising of these rates, and it does not appear that they made any such objection and they will not now be heard to complain of any alleged difference in rates.

(11) If intervenors are appearing as representatives of the defendant companies and asking for an increase in rates for and on behalf of defendant companies, they have no standing in court for this purpose and cannot be made parties. If their interest is adverse to that of defendant companies they have no standing in court and cannot be made parties.

(12) The alleged difference in rates having been brought about by the action of the R. R. Commission at the instance and request of defendant companies in raising the rates on other lines of defendant companies other than from Decatur to Atlanta and vice versa, and the legislature of Georgia, by excepting said contract with the Town of Decatur in the proviso of the act of August 23d, 1907,

having approved this contract, and having refused to take 306 jurisdiction over said contract or to abrogate said contract or to give the R. R. Commission or any other tribunal jurisdiction over said contract, and the legislature being supreme under the constitution of Georgia in the matter of preventing unjust discriminations, there is no power in this court or in any court to declare said contract null and void and unconstitutional for any alleged discrimination and said contract must stand until the general assembly of Georgia chooses to take jurisdiction over it. This court cannot override the will of the general assembly in this matter.

(13) Intervenors can have no greater or different rights or equities than those belonging to defendant companies and, if allowed to be made parties defendant in this suit, they must stand or fall upon such defenses, and such only, as defendant companies may be able

o make in this cause. They cannot raise new issues or other and outside issues which defendant companies cannot make or raise.

Defendant companies are estopped from raising the question that said contract is discriminatory because of the fact that they have accepted the benefits, franchises and privileges granted to them under said contract with the Town of Decatur and said companies now are in possession of and now enjoy the benefits, franchises and privileges thus granted to them; they are estopped from raising any question of discrimination or attacking said contract with the Town of Decatur for the reason that any differences in rates, if any, have been brought about, not by any modification in said contract, but by increases in rates upon other lines of said companies upon the motion of and at the instance and request of said companies and for the benefit of said companies; they are estopped from attacking said contract upon said ground because of the other facts set up in the pleadings and called attention to in the demurrsers of petitioner to the cross bill of defendant companies; wherefore intervenors 07 are estopped from attacking said contract with the Town of Decatur upon said ground of discrimination.

(14) Since it appears from the pleading in this case and the admitted facts therein, that the defendant companies are concluded on the question of discrimination, as well as on other questions which they now attempt to raise, by the decision of the Supreme Court in the said mandamus suit of the Georgia Railway & Power Company v. Railroad Commission of Georgia and the final judgment in said suit, and that the question of discrimination as well as other questions attempted to be raised are res adjudicata between the parties by reason of the final judgment in said mandamus suit; wherefore, intervenors are all concluded as to said question of discrimination by the final judgment in said mandamus suit.

Wherefore, petitioner prays judgment sustaining this demurrer and prays the court to disallow or dismiss said intervention and to strike said intervenors as parties from this cause and that the prayers of said intervenors be denied.

L. J. STEELE,  
FRANK HARWELL,  
GREEN, TILSON — MCKINNEY,  
*Petitioner's Attorneys.*

Filed in office 26 day of November, 1920.

B. F. BURGESS,  
*Clerk.*

Upon considering plaintiff's several demurrsers to the petition or intervention of R. C. Hackman, C. H. Knox, G. R. McNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. R. Davis, C. E. Bennett, W. E. Field, M. E. Haun, Davis Haun, F. McDonald, Jr., and J. C.

Gorman, the same are hereby sustained upon each and every ground of general demurrer therein contained and said petition or intervention is hereby stricken and dismissed. Special grounds 308 demurrer are not now passed on.

In open court this December 10th, 1921.

JOHN B. HUTCHESON,  
*J. S. C., St. Mountain Circuit*

De Kalb Superior Court.

No. —.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER Co. and GEORGIA RAILWAY & ELECTRIC Co.

And now comes the Georgia Railway & Electric Company and the Georgia Railway & Power Company, defendants in the above stated case without waiving their pleas to the jurisdiction in answer to the petition filed in said case and by way of cross bill alleges:

(1) Defendants admit the allegations of paragraphs 1, 2 and 3 of the petition.

(2) Defendants deny the allegations of paragraph 4 of the petition.

(3) Defendants admit that prior to December, 1902, the street railway lines spoken of in paragraph 5 of the petition were operated either by the Georgia Railway & Electric Company or by other street railway companies. Defendants say that the Georgia Railway & Electric Company ceased to operate the most northern of said lines prior to December, 1902.

(4) Defendants admit paragraphs 6 and 7 of the petition.

(5) For want of sufficient information defendants can neither admit nor deny the allegations of paragraph 8.

(6) Defendants deny paragraph 9 as alleged. Defendants admit that the Georgia Railway & Electric Company did commence to lay up said described line of street railway within the corporate limits of the town of Decatur, the portion of said line having been abandoned.

(7) Defendants admit the allegations of paragraph 10.

309 (8) Defendants deny the allegations of paragraph 11. As hereinafter shown defendants allege and say that neither the petitioner nor defendants had any power or authority to enter into the so-called contract and that there was never any valid contract.

provision with reference to fares or transfers and that there is not now any valid contract existing between petitioner and defendants with reference to fares or transfers. Defendants admit that Exhibit "B" is a true copy of the written instrument executed.

(9) Defendants deny the allegations of paragraph 12.

(10) Defendants deny the allegations of paragraph 13 of the petition. Defendants admit that Exhibit "C" is a true copy of the order passed by the judge of the superior court of Fulton county.

(11) Defendants deny the allegations of paragraph 14 of the petition.

(12) Defendants deny the allegations of paragraph 15 of the petition as alleged in that defendants say that there was never any valid contract provision existing between petitioner and defendants. Defendants say that if there ever was a contract provision between defendants and petitioner with reference to fares that said contract is now at an end, is terminated, is illegal and void as hereinafter set out. Defendants deny that there ever was any existing contract provision entered into between defendants and petitioner with reference to fare, if there ever was such a contract it has been fully performed is now at an end, and is terminated for reason hereinafter set out.

(13) Defendants admit the allegations of paragraph 16 of the petition.

(14) Defendants deny the allegations of paragraph 17 of the petition as alleged. Defendants admit that the Georgia Railroad Commission held that it had no jurisdiction to fix fares in so far as the town of Decatur was concerned. Defendants say that 310 prior to said first holding of said commission it had held that 6 cents fare was a reasonable charge on defendants' lines including the Decatur traffic, and that subsequent to that time and on September 22, 1920, it held that 7 cents fare was a reasonable fare to be charged on said line with reference to intermediate points between Atlanta and Decatur, said last holding of the commission being hereafter set out more in detail.

(15) Defendants admit the filing of a petition against the Railroad Commission of Georgia as alleged in paragraph 18 of the petition. Defendants say that petitioner was not a party to said proceedings and neither was one of the defendants, to wit, the Georgia Railway & Electric Company, a party to said proceedings. Defendants admit that Exhibit "E" is a part of the mandamus petition; otherwise said paragraph is denied.

(16) Defendants admit the allegations of paragraph 19 of the petition.

(17) In answer to paragraph 20 of the petition defendants say that the Exhibit "E" attached to the petition or the copy of the pe-

tion for mandamus will show that contentions were made by the Georgia Railway & Power Company in said case. Defendants say that petitioner was not a party to said case, and neither was the Georgia Railway & Electric Company a party to said case.

(18) In answer to paragraph 21 of the petition defendants admit that the judgment by Geo. L. Bell was carried to the Supreme Court of the State of Georgia and that the Supreme Court rendered a decision in said case. Defendants say that petitioner was not a party to said case and neither was the Georgia Railway & Electric Company.

(19) Defendants deny the allegations of paragraph- 22, 23, 24, 25 and 26 of the petition.

(20) Defendants further say that petitioner is not entitled to any of the relief for which it prays in said petition.

For further answer and cross bill defendant allege and show:

(21) What is known as the main or North Decatur line is a suburban railway running from Atlanta to and in Decatur a distance of 6.417 miles. Said line was constructed and is operated by virtue of the power and authority received from and conferred by the State of Georgia to defendants or their predecessors in title.

(22) Said line runs from the corner of Pryor and Edgewood Ave. in the city of Atlanta over various streets of said municipality to the limits of said city a distance of 4.724 miles. A part of said line now within the corporate limits of the city of Atlanta is in Fulton county, Georgia, since the construction of said line the said limits of the city of Atlanta has been extended further east and a part of said municipality is now in De Kalb county, Georgia. After thus running in Fulton county and part of the city of Atlanta and De Kalb said main or North Decatur line runs through what was formerly the town of Edgewood and then through the corporate limits of said municipality; then through Kirkwood and its corporate limits; thence over what was formerly a part of the right of way leased from the Seaboard Air Line Railway or over a private right of way owned by defendants to the then corporate limits of the town of Decatur (the corporate limits of Decatur at the time of the construction of said line only extended westwardly to a point approximately half-way between Newnan and Forest streets) thence said line made a loop in Decatur coming back to the same right of way that was travelled in the trip from Atlanta to Decatur at McDonough street near the right of way of the Georgia Railroad. Said

line as then constructed ran from the city of Atlanta a distance of 5.424 miles to the then corporate limits of the town of Decatur and within the limits of said town a distance of only .993 miles.

(23) Defendants or their predecessors in title received consent from the city of Atlanta, the county of De Kalb (with reference to

part of said line constructed through no municipality), the town of Edgewood, the town of Kirkwood and the town of Decatur to construct the parts of said line located within the respective limits of said municipalities and on the roads in De Kalb county with reference to the part of said line constructed through no municipality.

(24) Defendants say that said main or North Decatur line was constructed and operated by authority from the State of Georgia as aforesaid and that the town of Decatur granted its consent for the construction of said line in and through the town of Decatur on September 4, 1899, said consent being granted to the College Park & Belt Railway Company and said consent contained no provision, limitation or specification with reference to fares or the rate of fares to be charged on said line. Defendants say that with reference to the construction or operation of said main or North Decatur line there was no limitation placed in the consent ordinance by the town of Decatur which limited or specified the rate of fares to be charged on said line. A copy of the said consent ordinance being hereto attached and made a part of this answer and cross bill and marked Exhibit "A."

(25) Defendants say that the line known as and in the petition called the Atlanta Railway Company line (the line which is discontinued) had been constructed and operated by virtue of authority from the State of Georgia; that the town of Decatur granted its consent to the construction of said line in and through the town of Decatur as shown by Exhibit "B" attached to this answer and cross bill and made a part of the same. Said consent contained  
313 no provision limiting or specifying the rates of fares to be charged on said line.

(26) The portion of said Atlanta Railway Company line had been discontinued and the tracks of said line were being moved from the streets of Decatur when the injunction suit set out and named in the petition as Exhibit "A" of the petition was filed.

(27) The consent to the dismissal of said injunction suit, set out as Exhibit "B" to the petition in this case was agreed to by petitioner. Among other things the ordinance of the town of Decatur attached to the consent of the dismissal of said injunction suit contains a provision as follows:

"To never charge more than five cents for one fare upon its main Decatur line, above referred to as the Rapid Transit line, for one passenger, and one trip upon its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur or from the terminus of said line in the town of Decatur to the terminus of the same in the city of Atlanta, and the trip either way shall include the entire loop in the town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of twelve o'clock midnight and five

o'clock a. m. the said Rapid Transit line above referred to having the following route, to wit: Commencing in the city of Atlanta at the intersection of Peachtree Street and Edgewood Avenue, and running thence in an easterly direction along Edgewood Avenue to Hurt Street thence in a southerly direction along Hurt Street to Decatur Street; thence along Decatur Street, which is immediately north of the Georgia Railroad, in an easterly direction to a point where said street is intersected by the line between the counties of Fulton and

314 De Kalb, thence continuing in the same general direction immediately north of said Georgia Railroad until it intersects the western limit of said town of Decatur where it crosses North Railroad Avenue; thence continuing in the same direction in the town of Decatur along said North Railroad Avenue to North Railroad Avenue to North Candler Street, thence along North Candler Street north a short distance to a continuation of said North Railroad Avenue, thence in an easterly direction along said continuation of said North Railroad Avenue to Oak Street, thence north along said Oak Street to Broad Street, thence west along said Broad Street to East Court Square; thence south along East Court Square to South Court Square, thence west along said South Court Square to South Court Square, thence west along said South Court Square to McDonough Street, thence south along said McDonough Street to said North Railroad Avenue, there connecting with said line a short distance from when it enters said town of Decatur coming from Atlanta and forming a complete loop within the town of Decatur." Said provision is hereafter called the "so-called contract provision."

Among other things said ordinance contained a provision as follows:

"To grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the town of Decatur upon said Rapid Transit line to any point within the city of Atlanta on any of its lines in said city, and vice versa, which does not result, however, in carrying the passenger on a parallel line, or in the same general direction from which he came, provided such transfer is requested at the time of the payment of the fare, and provided the passenger shall abide by such reasonable rules and regulations as the company may make, so as to limit the time in which such transfer is used, in order that it may be available only for

315 the first connecting car, and in order to cover such other matters as the company may deem necessary or proper to protect the company from imposition, abuse, or assignment of such transfer, and to avoid liability in damages from mistakes that may be made by the passengers or the employees in regard to such transfers."

(28) Defendants say that petitioner had no authority or power to contract with reference to the discontinuance of the line known as the Atlanta Railway Company and that any contract with reference to the discontinuing of the operation of said line was ultra vires; that a contract made with reference to a discontinuance of said Atlanta Railway Company line and the settlement of any injunction suit brought by petitioner with reference to discontinuing the same was an illegal

and invalid consideration and did not form any consideration or give petitioner any right, power or authority to attach the so called contract provision or the transfer provision to the main or North Decatur line at that time already constructed and at that time being operated by the Georgia Railway & Electric Company; and that said so called contract provision and said transfer provision cannot be attached to any consent provision *and said transfer provision cannot be attached to any consent provision* theretofore granted with reference to the construction of said main or North Decatur line, which was being already operated at said time. Defendants allege and show that each and all of the allegations herein made with reference to the so called contract provisions are also made with reference to the transfer provision and that wherever in its answer and cross bill the so called contract provision is referred to a similar and like reference is also made and charged with reference to the transfer provision.

(29) Defendants allege and say that said so called contract provision is illegal, invalid and without force and effect; that said provision was never valid or legal; that if at any time it was binding, legal or valid, it is not now binding or legal; defendants further allege and show that said so called contract provision has been terminated by defendants and is no longer enforceable as a contract provision if it ever had any binding effect; and defendants further allege and show that said so called contract provision cannot be enforced against them for the reason heretofore set out and those hereafter to be stated.

(30) Defendants allege that the fixing or regulation of rates or fares is a governmental or police function and that even in jurisdictions where the constitution of the State does not prevent the granting or abridging of the exercise of the police power and there is no prohibition against the granting of such power to a municipality such grant or power or authority can only be and must be conferred by express and explicit terms allowing of no other construction. Defendants say that no such power or authority has ever been conferred upon petitioner by the legislature of the State of Georgia or by the constitution of the State of Georgia; that no power to regulate rates or fares has been conferred by this State upon petitioner and that petitioner has never possessed and does not now possess such power. Defendants further say that the power to contract with reference to rates or fares cannot be inferred even if a municipality is given express authority with reference to regulation, and that even the power to regulate with reference to fares or rates does not confer any power or authority upon any municipality in this State to make a contract with reference thereto. Defendants allege and show that no power or authority has ever been conferred by this State by the legislature or constitution of this State upon petitioner to contract with reference to fares, and defendants allege that petitioner does not now and has never possessed any such power. Defendants say that for the reason stated plaintiff had no right, power

or authority to fix fares or to enter into said so called contract provision and that said provision is therefore ultra vires and void.

(31) Defendants allege and show that the so called contract provision was not an attempt on the part of petitioner to regulate fares or to contract with reference to fares to be charged within its municipal limits, but was an undertaking on the part of petitioner to fix fares to be charged for passenger service in and through other municipalities and wholly without its territorial limits. As heretofore alleged and shown the main or North Decatur line is an interurban line and runs nearly entirely in and through municipalities other than petitioner; defendants allege that the State of Georgia neither through its legislature nor through its constitution or otherwise has conferred upon petitioner any power or authority to regulate or contract with reference to fares or rates of fares to be charged by an interurban or street railway company for travel outside of the territorial limits of petitioner; that petitioner and said municipality does not and has never possessed such power and that no such authority has ever been conferred upon it, and for this reason the so called contract provision is ultra vires and void and beyond the power or authority of petitioner to make.

(32) Defendants further say that the constitution of the State of Georgia as contained in section 6464 expressly prohibits the abridgement of the police power and among other things provides: "The exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State." Defendants allege that said provision is a constitutional inhibition against petitioner making rate or fare contracts for as heretofore alleged the fixing or contracting with reference to rates or fares is a governmental or police power and the so called contract provision violates said constitutional provision is, therefore, illegal unconstitutional and void and cannot be enforced as a legal valid or binding contract provision.

(33) Defendants say that it does not serve a public purpose for a municipality to fix rates or fares to and from other municipalities, such fixing of rates or fares is not germane to the public purpose for which petitioner was created and for which petitioner exists. The fixing of interurban rates or fares is a legislative and not a municipal function; the fixing of fares by a municipality upon any part of an interurban line without the territorial limits of such municipality is a legislative and not a municipal function, and such power or authority must be exercised for the general well being of the State and the interest of the public and not in the interest of any particular municipality. By the so called contract provision petitioner does not undertake to regulate or make a contract with reference to the rate of fares to be charged within its municipal limits, but undertakes to contract with reference to fares to be charged on said main or North Decatur line running through the municipalities of Kirkwood, which

was formerly Edgewood, and the public thoroughfares of De Kalb county and Fulton county, also running through what was formerly a municipality known as Oakhurst, but which municipality has lately been taken into the territorial limits and made a part of Decatur. Defendants allege and show that it is against the public policy of this State and the general well being of this State for any municipality to fix rates, fares or to make rate contract having extra municipal effect and that for this reason said so called contract provision is illegal and invalid. Defendants further show that to permit the operation or to give effect or force to said so-called contract provision would cause inequality and conflict between different municipalities and would cause discrimination not only in conflict with and contrary to public policy of this State but also in conflict with and in contravention of the provision of the constitution of this State as contained in section 6464 of the code of the State of Georgia providing that the exercise of the police power of this State shall never be abridged, nor be so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State. Defendants say that the so called contract provision heretofore referred to is illegal, void and unconstitutional and in conflict with said constitutional provision.

(34) Defendants say that many years subsequent to the entering in of said so-called contract provision the city limits of the town of Decatur has been changed and extended and the municipal limits of said town of Decatur have been extended west towards the city of Atlanta to include 7/10 miles of track of the North Decatur line operated by defendants which was not included within the town of Decatur at the time of the execution of said so called contract. Defendants show that petitioner had no power or authority to give defendants any consent to construct any part of said line which was situated outside of the territorial limits of Decatur and that defendants secured the consent to construct the said main Decatur line outside of the territorial limits of Decatur, as they existed in 1903 either from other municipalities or from the county of De Kalb or the county of Fulton, that notwithstanding this fact petitioner claims that the so called contract provisions applies to the 321 territorial limits of Decatur as they now exist and that what is now called the Decatur traffic (being traffic going to and from any part of the present territorial limits of Decatur) must be hauled over the main or North Decatur line for the sum of five cents. Defendants say that such contention of petitioner even if the said so called contract provision is legal and enforceable is not legal, valid or enforceable; that petitioner cannot extend its territorial limits and make said so called contract provision apply to territory taken in by petitioner subsequent to the execution of the said so called contract provision; that said so called contract provision does not undertake to fix fares to be charged from any subsequently added territory of petitioner or even from all the territory included within the municipal limits of petitioner at the time of the execution of said so

called contract provision; that the said so called contract provision only undertakes to fix the fare to be charged from the terminus of the line in the city of Atlanta to the terminus of the line in the town of Decatur or from the terminus of the line in the town of Decatur to the terminus of the line in the city of Atlanta. For this reason defendants say that there is not even any so called contract provision which prevents defendants from charging 7 cents fare to and from Atlanta to any points other than from the terminus of said line in the town of Decatur to the terminus of said line in the city of Atlanta. Defendants further say that said so called contract provision if given any force and effect as a contract, being a contract with reference to the abridging of the exercise of the police power must be literally construed; as heretofore alleged defendants say and contend that said so called contract provision does not provide that a five cents fare shall be charged from all parts of Decatur to the

322 city of Atlanta, but merely from and to certain designated points in the city of Atlanta and from and to certain designated points in the town of Decatur. Defendants say that

there is a difference in the feasibility and the practicability of collecting different fares from a designated terminus in the city of Atlanta to a designated terminus in the town of Decatur and vice versa when applied merely to passengers riding between said termini than there is to passengers boarding or leaving the cars of defendants at points in Decatur other than the terminus of said line. In going from Atlanta to Decatur or from Decatur to Atlanta defendants charge 7 cents for all intermediate points between Atlanta and Decatur. Defendants' method of taking up fares is on boarding the cars known as pay-as-you-enter cars and on non-pay-as-you-enter cars soon after the passengers have boarded the cars; to require different rates of fares to be collected from all the passengers boarding or leaving the car within the entire territorial limits of the town of Decatur makes it necessary for defendants to collect fares on the trip from Atlanta to Decatur as passengers disembark from the cars; this requires the defendants to compel passengers to leave the cars only at the rear platform, whereas on other lines where the same fare is charged the passengers are allowed to disembark either from the front or rear of the car which is much more convenient to the passengers, expedites the debarkation from the car and facilitates service; defendants show that even if said so called contract provision is given full force and effect it should be held to apply only to passengers boarding or leaving the car at one of the termini of said line; all passengers who board the cars of defendants after the present western limits of the town of Decatur is passed have to and do pay a charge of 7 cents per passenger. Defendants show that

323 petitioner by extending its municipal limits further west claim the right to extend the point or change the point from

which a 5 cent fare could be charged and as already shown petitioner has extended the limits of petitioner 7/10 miles west than they were in 1903 at the time of the execution of the so called contract provision. Defendants show that petitioner could not make and did not make any contract with reference to fares for territory

outside of the limits at the time of the execution of said contract and could not and did not subsequently acquire such jurisdiction to make any so called contract provision apply to other or additional territory by extending its municipal limits. Defendants show that the terminus of said main Decatur line in the town of Decatur is McDonough and Sycamore Streets and the terminus in Atlanta is Edgewood Avenue and Pryor Street, and there is no contract provision that passengers boarding defendants' cars at other points should not pay the same fare as passengers boarding the same line at intermediate points between the western limits of Decatur and the city of Atlanta; and that said so called contract provision should not be given force and effect even if held valid so as to apply to passengers boarding or leaving defendants' cars at any and all points within the present territorial limits of petitioner.

(35) Defendants say that the transfer provision heretofore set out, does not set out or provide the amount of money which should be paid by a passenger in order to receive a transfer, defendants say that said transfer provision claims that a passenger is entitled to a transfer "upon the payment of one full fare." Defendants say that petitioner claims that Decatur traffic is entitled to a transfer upon the payment of 5 cents. Defendants say that even if said transfer provision is held to be a valid and binding contract it contains no such provision. Defendants say that the full fares upon its lines 324 as held and passed by the railroad commission of the State of Georgia is a seven cents fare and that Decatur traffic is not entitled to a transfer or to ride upon a transfer in continuation of any ride for which only 5 cents has been paid.

(36) Defendants say that said so called contract provision is indefinite with reference to the parties for whom petitioner claims or may claim said provision was entered into or executed, because of this indefiniteness said provision is incapable of enforcement or performance. As heretofore shown said so called contract provision is not with reference to travel within the corporate limits of petitioner. Said provision furthermore does not purport to be made or entered into for the benefit of any particular person or persons or for the benefit of citizens or residents of petitioner; it does not purport to have been made for the residents or petitioner at the time of its execution; it does not purport to have been made for the residents or citizens of petitioner at the present time. Defendants say that petitioner even if it had the right to enter into contracts for its citizens with reference to rates or fares, defendants deny that any power or authority was conferred upon petitioner to enter into the so called contract provision "for the public generally," and because of such indefiniteness the said provision cannot be held to be a contract. At the time of the execution of the said so called contract Decatur was by the 1900 census a municipality of 1,418 inhabitants. The 1920 census gave it a population of 6,150 inhabitants. As heretofore shown said contract does not purport to have been made for the inhabitants of petitioner at the time the provision was executed or for its inhabitants at the present time, including even the territory taken

in by petitioner since the execution of said provision. Defendants further show that since the execution of said so called contract provision a street or suburban street railway company has been built from Atlanta through Decatur to Stone Mountain. Defendants show that passengers can board said Stone Mountain line, at any point between Decatur and Stone Mountain and be brought to Decatur and disembark from said Stone Mountain car and take a car of defendant on said main or North Decatur line and ride into the city of Atlanta at a less rate than is charged on said Stone Mountain line. Defendants show that in addition to the other matters as heretofore charged there are changed conditions arising since the time of the execution of said so called contract provision; that the said so called contract provision is so indefinite with reference to the parties for which it was made that it cannot be enforced as a valid contract; and petitioner had no right to contract for the benefit of *party* living in different counties and in other and different localities from petitioner's territorial limits.

(37) Defendants show and allege that said so-called contract is indefinite as to the time it is to run; said provision contains no definite or fixed time during which a fare of 5 cents is to be charged and because of said indefiniteness said so called contract provision is revocable on notice, and as shown by Exhibit "D" attached to the petition defendants have served notice on petitioner terminating said contract on the 20th day of October, 1920, and said so called contract if it ever had any force and effect is now terminated.

(38) Defendants say that prior to 1918 it charged on all its car lines a uniform fare of 5 cents, that a passenger riding on its car and paying 5 cents was given a transfer which entitled such passenger to transfer and continue his ride upon other lines operated by defendants. Defendants show that the railroad commission of the 326 State of Georgia in its order on September 22, 1920 issued an order the material part of which order is attached to this answer and cross bill and marked Exhibit "C" and made a part thereof. In so far as the commission itself considered it had any power or authority with reference to fares on said main or North Decatur line it fixed the rate of fares to be charged for all passengers riding on said line at 7 cents per passenger. Said commission in said order further found, as shown by said exhibit that "the five cent fares now in effect on the Main Decatur line and College Park line, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes, are discriminatory. This commission is without power to increase them."

(39) Defendants further allege that provisions or contracts with reference to rates or fare being with reference to a legislative or police power, even when expressly permitted, must be for a definite term not grossly unreasonable and that where the provisions as to rates are indefinite it is revocable on notice under changed conditions. Defendants say that there have been numberless changed conditions as

heretofore set out in this answer and as hereinafter detailed. Defendants say that the costs of material entering into the upkeep of said line, the costs of labor and the furnishing of the service to haul passengers has greatly increased and changed since said contract was entered into. Defendants say that the railroad commission of the State of Georgia in its order of September 22, 1920, expressly stated and held: "The five cent fares now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes, are discriminatory." Defendants say

327 that this is a holding and finding of the commission itself that there have been changed conditions vastly different from those existing at the time of the entering into of said so called contract provisions. Defendants further show that not only have such changed conditions — but that the railroad commission of the State of Georgia claimed that it had the right to fix service on said line in its said order of September 22, 1920, ordered and declared that defendant must increase its service on said Decatur line and that on said Decatur line defendant shall operate trailers on all schedules during rush hours. Defendants say that this order of the commission, increasing the service on said Decatur line, in and of itself is a changed condition and all of said changed conditions authorize the cancellation of said so called contract provision as shown by Exhibit "D" attached to said petition and said contract is no longer enforceable, but should be held to be revoked and terminated.

(40) Defendants further allege that the so called contract provisions is with reference to a public duty placed upon defendants as a quasi public corporation but for defendants to continue to carry out said provision and charge 5 cents hampers defendants in the discharge of their duties to the public. Defendants owe a duty to serve the public equally and without discrimination. On intermediate points between Decatur and Atlanta, on the main or North Decatur line a fare of seven cents is charged, said passengers securing less service than that afforded to what is called the main Decatur traffic. Defendants say that to continue said so called contract provision, indefinite in time, in force at the present time would be an interference and an infringement of the public duty which defendants owe to their other patrons; defendants cannot be forced to operate

328 their property for the public at non-compensatory rates, the charge of 5 cents to Decatur traffic is confiscatory and not compensatory, in fact and as held by the railroad commission of the State of Georgia; that for defendants to continue said so called contract provisions in force and effect would place a larger burden upon other patrons of defendants and for these reasons defendants were justified in terminating said so called contract provision.

(41) Defendants further show that they have and operate what is known as a South Decatur line which runs from Atlanta to Decatur. Said line runs through various municipalities in Fulton and

De Kalb counties and is practically of the same length as the Main or North Decatur line; that when said line reaches a point in Decatur near what is known as the Georgia Railroad depot that it runs for a considerable distance in Decatur parallel to the main or North Decatur line, the distance between the two said lines being merely the right of way of the Georgia Railroad. That traffic on said South Decatur line including traffic and passengers boarding said car in Decatur defendants charge at the rate of seven cents per passenger. Defendants say that to charge 5 cents on the main or North Decatur line to ride from Decatur to Atlanta and a charge of 7 cents on the South Decatur line shows discrimination which is illegal, unjust and unconstitutional as hereinafter set out; that at the time of the execution of the so called contract provision the same rate of fare was charged on said South Decatur line as was charged on the main or North Decatur line; that this change of fare on the South Decatur line shows a change of conditions justifying a termination of said so called contract provision.

(42) Defendants further show and allege that it was and is beyond the legal and constitutional power of defendants to make a binding contract with reference to fares, such as the so-called contract provisions, and that said provision was ultra vires of any power or authority of defendants to enter into same and therefore, void. Defendants are quasi public corporations and cannot legally make or enter into any contracts or agreements contrary to public policy or contracts or agreements which interfere with or in any way impair its duties as such quasi public corporations or effect its duties towards other individuals or municipalities or other patrons of its line than those with which a contract may be made. Defendants owe public duties to other municipalities and to other patrons of its line in conflict with said so called contract provision. It is ultra vires of defendants' power to make a contract with one municipality to haul passengers from it to and through other municipalities at a different rate of fare than is or may be charged for passenger service in said other municipalities and any such contract or contract provisions would be against the public policy of this State and therefore ultra vires. Defendants further say that section 6467 of the constitution of the State of Georgia prohibits and forbids the defendants from making any contract which would directly or indirectly give a rebate or bonus in favor of any particular individual, any particular locality or any particular municipality. That to carry out the provisions of said so called contract would be giving to petitioner a rebate, a bonus and a discrimination and for said reasons said so called contract provision is unconstitutional and void as being in violation of section 6467 and in violation of section 6463 prohibiting unjust discrimination.

(43) Defendants show and allege that on the 22nd day of September, 1920, the railroad commission of the State of Georgia fixed rates of fares for all passengers riding on the Main Decatur line within the city of Atlanta at seven cents, for all passengers riding on

330 said line within the limits of formerly Edgewood seven cents; for all passengers riding on said line within the limits of Kirkwood seven cents; for all passengers riding on said line from Atlanta to the western limits of Decatur and all intermediate points at seven cents. Defendants show that this action of the commission was the action of the State of Georgia and has the force and effect of a legislative statute enacted by the legislature and approved by the governor of this State. Defendants say that this action of the State nullifies all rates of fares to be charged on said Main or North Decatur line in conflict with said seven cents rate of fare as fixed by the commission and that said rate of fare as fixed by the commission nullifies any rate of fare on said Main Decatur line outside of the municipal limits of petitioner. Defendants say that until the commission made its action in 1919 its action fixing rates of fare on said Decatur line at 6 cents, and the action of September 22nd, 1920, fixing the rate of fares on said Decatur line at seven cents, the State of Georgia had not taken jurisdiction over said line and that the fare over all lines of the defendant had been until 1919 five cents. Defendants say that it was the action of the railroad commission of the State of Georgia which fixed the rate of fare on what is known as the South Decatur line at seven cents. Defendants say that at the time of the action of the Supreme Court of Georgia in the case of Georgia Railway & Power Company v. Railroad Commission of Georgia the State had not taken such jurisdiction over any part of said Decatur lines or fixed a rate of fare on said line different from that set out or provided in said so called contract provision, but that the said action of the State was taken after the rendition of the decision by the Supreme Court of Georgia in said case. Since the rendition of said decision the State has 331 acted as heretofore set out. Defendants say that the State's action is in conflict with said so called contract provision, at least so far as the same effects the Main Decatur line outside of the territorial limits of petitioner and defendants say and allege that said action of the State itself automatically suspends and sets aside said so called contract provision in so far as the same applies to said Main Decatur line outside of the limits of petitioner. Defendants say that the rendition of the decision of the Supreme Court does not act as an estoppel for the reason that petitioner was not a party to said suit and for the further reason that in said suit the Supreme Court expressly recognized that if the State exercised its police power then the so called contract provision would be null and void.

(44) Defendants say and allege that the railroad commission of the State of Georgia is given no right, power or authority to itself to declare or set aside contracts or so called provision with reference to fares. That if it be held that the action of the commission of and in itself in fixing rates on said Main Decatur line did not render said so called contract provision null and void, unconstitutional and unenforceable that then this court as a court of equity must exercise its jurisdiction and must hold that said contract is illegal, void, discriminatory and unconstitutional and enjoin the enforcement of

said so called contract provision and defendants allege and claim that a public duty rests upon it not to carry out said illegal, void and unconstitutional provision.

(45) Defendants say that to charge a passenger 7 cents to ride on said Main Decatur line within the corporate limits of Atlanta or to and from Atlanta and Kirkwood or to and from Atlanta and the western limits of Decatur and all intermediate points and then only charge five cents for a ride from and to Decatur and Atlanta 332 on the Main Decatur line and issue transfers to such passengers paying five cents giving them the privilege to ride on all other lines of defendants in the city of Atlanta or running in territory adjacent to Atlanta when a fare of seven cents is charged on such other lines, is discriminatory. Defendants say that to charge 5 cents to what is known as Main Decatur traffic places an additional burden upon other municipalities and localities and upon other patrons of defendants for such other localities or patrons may be compelled to stand a greater increase than would otherwise be required if the rate of fare as to the said traffic should be increased with reference to the facilities afforded such traffic. Defendants say that the State of Georgia, through its railroad commission has fixed the rate of fare on said line, except with reference to what is known as the Main Decatur line traffic at seven cents and defendants say that such fixing of fare on said line renders the rate in said so called contract provisions discriminatory, illegal, unconstitutional and void and that said so called contract provision is especially illegal and unconstitutional with reference to all traffic on said line outside of and beyond the municipal limits of Decatur. Defendants say that the public policy of the State of Georgia as enunciated by the acts of the legislature of this State and as set out and expressed in its constitutional provisions declare and make all discriminatory fare contracts, rebates or bonuses directly or indirectly granted which may have arisen by virtue of any device or contract entered into since the adoption of the constitution of 1877 void and defendants say that said so called contract provision is now in conflict with said public policy of the State of Georgia and is for this reason null and void.

333 (46) Defendants say that to give force and effect to the said action of the commission fixing a seven cents fare on said Main Decatur line and to give force and effect to the said so called contract provision would be to produce on the same line and over the same section of the line two entirely separate and distinct rates of fare, the smaller fare being charged for the longer haul and the greater service and the greater fare being charged for the lesser service, or shorter haul, and that to carry out the enforcement of such two rates of fare would be contrary and detrimental to the public interest, peace and tranquility and in conflict with the general well being of the State and an infringement of the equal rights of individuals. In addition to what has just been said defendants also show that its South Decatur line runs from Atlanta to Decatur. From said line at what is known as East Lake junction a portion of said line branches off and goes to East Lake while another portion

goes from said East Lake Junetion to Decatur; over the whole of said line including traffic from Decatur a seven cents fare is charged. Defendants say that to give force and effect to the action of the commission fixing a seven cents fare on all portions of said South Decatur line and to give force and effect to the said so called contract provision would be contrary and detrimental to the public interest, peace and tranquility and in conflict with the general well being of the State and an infringement of the equal rights of individuals and would be discriminatory and illegal.

(47) Defendants say that if said so called contract provision was valid and enforceable at the time it was made and was then valid and *and* enforceable with reference to the entire Main Decatur line beyond its corporate limits; still said so called contract provision must now yield to the State's action in fixing the rates of fare for all points from the western limits of Decatur over said Main Decatur 334 line at a 7 cents fare and that all passenger- now hauled over said part of the Main Decatur line must be charged at the rate of 7 cents.

(48) Defendants further show that the said so called contract provision is illegal, void and unconstitutional because the same is in conflict with constitutional provisions of the State of Georgia prohibiting discrimination of any kind or character with reference to service by defendants. Defendants say that such constitutional provision make it unlawful and unconstitutional for defendants to collect less for travel over the entire Main Decatur line the longest haul than is charged for intermediate points between Atlanta and Decatur. Defendants say that the constitution of the State of Georgia as set out in section 6463 of the code prohibits unjust discrimination by railroad companies; that said State constitutional provision as contained in section 6464 prohibits corporations from conducting their business in such manner as to infringe the equal rights of individuals, or the general well being of the State, and section 6467 prohibits defendants from giving or paying any rebate or bonus in the nature thereof, directly or indirectly, and defendants say each of said provisions of said constitution renders said so called contract provision illegal and void as now being in conflict therewith.

Defendants further say that in carrying out said constitutional provisions the legislature of the State of Georgia has passed and enacted laws declaring discrimination of any kind or character illegal and void and that said so called contract provision is now in conflict with said laws as enacted by the general assembly of this State and for this reason said so called contract provision is now illegal and void.

(49) Defendants say that the railroad commission of the State of Georgia in its order of September 22nd, 1920, expressly held: 335 That the so called contract is now discriminatory. Said commission further held that it had no power over such discriminatory contracts and this court must assume jurisdiction and declare said contract illegal, unconstitutional and void as being discriminatory.

(50) Defendants say that the railroad commission of the State of Georgia claims that it had assumed jurisdiction over defendants with reference to the fixing and regulation of service on the Main Decatur line and with reference to Main Decatur line and with reference to Main Decatur traffic. Defendants say that the commission has for some time regulated the number of cars and required this defendant to put on additional service to that furnished by defendants at the time of entering into the so called contract provision heretofore set out. Defendants say that at the time of entering into said so called contract provision the service furnished by defendants to petitioner on the Main Decatur line amounted to, to wit, 4 cars per hour. Under the orders of the railroad commission of Georgia and under its supervision the present service on said line amounts to 18 cars per hour. Defendants further say that the commission's order of September 22, 1920, the said commission's order provides that defendants, as early as practicable within 6 months from October 1, 1920, should operate trailers on its Main Decatur route on each schedule now operating during the morning and afternoon rush hours as now established, to wit, during the hours of 5:15 to 9:00 in the morning and 4:00 to 8:00 four hours in the afternoon. Defendants say that the commission itself in its said order of September 22, 1920, states that to perform the present service on said Main Decatur line under a 5 cents fare is not fairly compensatory. Defendants say that said action of the commission in ordering defendants to increase their service

236 if the commission has power to make such order, is an order

by the State of Georgia and is an order, which together with its other orders on said line makes the additional service rendered on said line confiscatory and that if the law gives such power to the commission and such orders are valid, the said contract provision for a 5 cents fare with said increased service will amount to confiscation of defendant's property without compensation, without due process of law and would deprive the defendants of the equal protection of the law in contravention of the 14th amendment of the constitution of the United States found in Georgia Code Section 6700 and contrary to the constitution of the State of Georgia found in sections 6358 and 6359. Defendants say that said action of the commission requiring increased service on said Main North Decatur line from time to time and its said order of September 22, 1920, are not acts or contracts on the part of these defendants, but were acts or orders on the part of the State of Georgia and that said action sets aside and abrogates the so called contract provision, because said orders make said contract provision confiscatory. Defendants say that complying with said orders of the commission has made a cost per passenger with reference to said Main Decatur traffic to and from Atlanta and Decatur amount to, to wit, the sum of 9.29 cents per passenger without regard to any return on the value of the property of defendants actually used in the public service. Defendants say that either the railroad commission of the State of Georgia has no power or authority to increase the service which increase in service will require an increase in costs for said

service greatly in excess of that procured by the so called contract provision or the increase of said service abrogates and sets aside said so called contract provision because the action of the State through its legislative regulatory body as to service has made 337 said so called contract provision confiscatory, illegal and unconstitutional.

(51) Defendants say that under the law of the State of Georgia and constitution of the United States and the State of Georgia, as just heretofore set out, the railroad commission of the State of Georgia cannot have authority to order changes or additions to defendant's service, while it has no power or authority to increase the fare to a point which will pay for the additions and changes in service and provide a reasonable return upon the value of the property used in performing said service, and that as petitioner invokes the jurisdiction, power or authority of the railroad commission to require the defendant to perform such service on the Main Decatur line; that such action on the part of petitioner estops it from denying the commission's power to fix compensatory rates for such service. Defendants say that for the railroad commission to regulate service on the Main or North Decatur line, its jurisdiction with reference to the regulation of such service being asserted by petitioner amounts to an action on the part of petitioner causing the confiscation of defendant's property in violation and in contravention of the constitution of the State of Georgia as set out in section 6358 of the code and the 14th amendment of the constitution of the United States as set out in section 6700. Defendants say that the order of the railroad commission of September 22, 1920, requiring defendants to increase their service on the Main or North Decatur line is confiscatory for that said commission itself held and decided in said order that service on said line and with reference to Decatur traffic on said line was not compensatory and that the order of the commission compelling defendants to put on additional service on said part of said line is confiscatory and violates the constitutional provisions heretofore cited.

338 (52) It is claimed by petitioner and by the railroad commission of the State of Georgia that by virtue of the acts of 1907, page 73 et seq. said commission is given jurisdiction over defendants with reference to service and equipment of said company used in connection with the Main Decatur line traffic and that said commission can require these defendants by its orders to make such changes and additions to such service as said commission requires and it is contended by petitioner that said commission though given this power to regulate service has been given no power or authority to increase the rates or fare with reference to said Main Decatur service to the extent necessary to yield even the required expense of such service. Defendants say that if the said act of the legislature be given such construction that said act is now confiscatory, unconstitutional and void. Defendants say that complying with the orders of the railroad commission with reference to service, the expense of service per passenger with reference to traffic to and

from Atlanta and Decatur on the Main or North Decatur line 9.29 cents. Defendants further say that the commission itself in its order of September 22, 1920, has itself expressly held and stated that under the so called contract provisions the service with reference to said Main Decatur traffic is not fairly compensatory and such ruling was made with reference to the then existing service required by the commission without consideration of the extra service required by said order to be performed by the defendants within 6 months after October 1, 1920. Defendants say that under the present state of facts that any legislative act which deprives the commission of the power to increase the rate of fare but grants it the power and authority to increase service to such an extent that such increased service will require an income in excess of that produced

339 by any rate of fare protected by said act would make said act in contravention of the constitution of the State of Georgia as set out in sections 6358 and 6359 and the 14th amendment of the constitution of the United States as set out in section 6700 of the Georgia Code of 1910 providing for the equal protection of the law and providing that no person shall be deprived of life, liberty or property without due process of law, defendants say that either of said act of 1907 is void for the reasons aforesaid, or the exception to said act providing "nothing therein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, provided this act shall not operate as a repeal of any existing municipal ordinance" is illegal, void and unconstitutional, for the reasons just stated, and defendants attack said exception on one of said constitutional grounds.

(53) Defendants further say that if the so called contract provision is held to come within the exception of the act of 1907, pp. 73 et seq. which exception provides: "That nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that this act shall not operate as a repeal of any existing municipal ordinance," then said exception of said act is invalid and unconstitutional, for the additional reasons hereinafter set out. Defendants say that said act purports and does give to the commission jurisdiction over rate contracts between street railway companies and private persons and over all contracts between municipalities and street railway company except those made prior to 1907. Said act gives the commission jurisdiction over all rate contracts contained in so called consent franchise contracts between a municipality and a street railway company entered into subsequently to 1907. Defendants say that there is no legal, just or distinguishing classification between so called franchise contracts made prior to 1907 containing rate provisions for service to private patrons

340 claimed to be exempted from the commission's jurisdiction and contracts entered into between the parties themselves for similar service, and to place contracts entered into by parties themselves for similar service under the commission's jurisdiction and not to place

tracts entered into by municipalities for such patrons under the commission's jurisdiction is not a legal classification but creates discrimination. Defendants further say that there is no legal distinction and separate classification between so called contracts made prior to 1907 and those made subsequent thereto. Defendants say that private contracts entered into between private parties and defendants or with a street railway company with reference to fares are held subject to the commission's jurisdiction and that to hold them subject to the commission's jurisdiction and to exclude from the commission's jurisdiction contracts made by a municipality for the benefit of private patrons — discriminatory and unconstitutional and makes such excepting clauses contravene the constitution of the State of Georgia as contained in sections 6358 and 6359 and the 14th amendment of the constitution of the United States as contained in section 6700 insuring to parties due process of law and the equal protection of the law.

Defendants further say that the acts of 1907, page 73 et seq., conferred power upon the railroad commission of Georgia to fix rates of fare and regulate rates in all cases except that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that this act shall not operate as a repeal of any existing municipal ordinance. Defendants say that by virtue of such power

and authority the railroad commission has acted and fixed the rates of fares to be charged by defendants as heretofore shown at 7 cents per passenger. Defendants say that if said exception to said act was a recognition of a 5 cents rate of fare with reference to the Main Decatur line traffic that then said legislative act itself or said exception contained in the act is now void and unconstitutional because the same is discriminatory and violates the prohibitions of the constitution of the State of Georgia forbidding discrimination as contained in sections 6463 and 6465 forbidding corporation to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State, and section 6467 forbidding rebates and is also in violation of section 6469 which is a mandate upon the general assembly of the State of Georgia to carry out the provisions against discrimination and any act or exception to an act which tends to produce or create discrimination would become unconstitutional whenever such discrimination came into existence.

(54) Defendants show to the court the following facts and allege, the court should hold that the so called contract provision is a valid, binding contract and that defendants cannot charge more than 7 cents per passenger for what is known as the Decatur traffic to and from Atlanta or Decatur on the Main Decatur line, defendants say that the performance of such contract would require defendants to perform the service at less than the costs of such service and defendants would not receive any return whatever upon the value of their property employed in carrying out such service. Defendants say that the costs of hauling passengers on the Main or North Decatur

line to and from Decatur and Atlanta amounts to 9.29 cents and hauling the Decatur passengers for any average distance on said Main Decatur line costs much over the amount of 5 cents per passenger for

any reasonable distance; that the cost of hauling Decatur passengers from Decatur to Atlanta and giving them transfers

342 would increase the service costs to something more than 13.33 cents per passenger. Defendants say that constitutionally and legally it cannot be required to continue to perform said confiscatory contract. That defendants are public utility corporations incorporated for the purpose of serving the public and that the future fulfilling of said contract provision, if it is held to be legal and binding would interfere with defendants' service to its other patrons and that said contract would in a large measure disable defendants from performing its legal duties to the public. If it is held by the court that defendants cannot terminate said so called contract provision, without at the same time giving up the right to operate its cars within the municipal limit of Decatur on the said Main Decatur line and at the same time give up any rights they may have under the provisions of the former consent ordinances of the town of Decatur for the construction of said line, or if it be held that said so called contract provision has become a legal binding contract, and has become an integral part of defendants' right to maintain its main or North Decatur line within the territorial limits of petitioner, defendants say that they hereby surrender all rights they may have under or by virtue of any so called consent ordinances, franchises or so called consent agreements and ask the court to declare all their rights under and by virtue of any of said contracts null and void and ask the court to relieve the defendants of operating said main or North Decatur line within the limits of Decatur and to permit defendants to take up the tracks of said line within the corporate limits of Decatur. Defendants say that constitutionally they cannot be required to op-

erate their said property under and by virtue of any so called 343 contract provision within the limits of Decatur at a loss and it

has been impossible and is impossible and will continue to be impossible to operate said portion of said line with reference to said Decatur traffic at 5 cents save at a continuing loss and defendants say that under the constitution of the State of Georgia as contained in section 6359 and the constitution of the United States as contained in section 6700 of the Georgia Code the 14th amendment of the constitution of the United States, defendants would be deprived of their property without due process of law, if they should be required to operate their cars within the corporate limits of Decatur under the so called contract provision or any so called franchise contract. If the court should hold that said so called contract provision limiting the fare to 5 cents must be performed and is binding unless defendants abrogates its entire right to maintain or operate its said main Decatur line within the limits of Decatur or unless defendants terminate all consent ordinances or so called agreements for the construction of said line within the corporate limits of said town, defendants hereby offer to surrender the entire contract ordinances or consents and cease to operate cars in order within petitioner's territorial limits.

(55) Wherefore defendants pray:

(a) That said so called contract provision be declared as not enforceable as a valid and binding contract between the parties.

(b) That said so called contract provision be declared illegal, void and unconstitutional.

(c) Said so called contract provision be now declared terminated and of no force or effect.

(d) Said so called contract provision be declared to have been performed and that defendants be relieved from any further performance of the same.

¶ (e) That the transfer provision be held not to apply to the granting of transfers upon the payment of 5 cents fare, but if enforceable at all upon the payment of fares prescribed by the railroad commission of the State of Georgia.

(f) That said transfer provision be declared illegal and void and of no force and effect.

(g) That plaintiffs and all other parties be restrained and enjoined from interference with defendants fixing and establishing reasonable, just and non-discriminatory fares or rates of fare with reference to Decatur traffic on the North or Main Decatur line and that petitioner and all other parties be restrained and enjoined from any manner or in any way interfering with defendants enforcing and collecting such reasonable, just and non-discriminatory fares as are fixed by defendants.

(h) Defendants pray for such other further relief as to the court may seem just and proper.

J. PRINCE WEBSTER,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
COLQUITT & CONYERS,  
*Attorneys for Defendants.*

GEORGIA,

*Fulton County:*

Personally appeared before the undersigned P. S. Arkwright, who oaths says that he is president of the Georgia Railway & Power company and that the facts stated in the foregoing answer and cross bill are true.

P. S. ARKWRIGHT.

Sworn to and subscribed before me, this 18th day of November, 1920.

[N. P. Seal.]

L. D. HINTON,  
*Notary Public, Fulton County, Georgia.*

345      GEORGIA,  
*Fulton County:*

Personally appeared before the undersigned W. H. Wright who on oath says that he is secretary of the Georgia Railway & Electric Company and that the facts stated in the foregoing answer and cross bill are true.

W. H. WRIGHT.

Sworn to and subscribed before me this November 18th, 1920.

[N. P. Seal.]

L. D. HINTON,

*Notary Public, Fulton County, Georgia.*

EXHIBIT "A."

*Grant by the Town of Decatur to Collins Park and Belt Railroad Company to Construct Line on Decatur Street, Candler Street, or Parallel Street East of Candler Street, Atlanta Avenue, and McDonough Street.*

Atlanta, Ga., August 26, 1899.

To the Honorable Mayor and General Council of the City of Decatur, Georgia:

The Collins Park and Belt Railroad Company respectfully petition your Honorable Body to grant to it the right and franchise to construct, electrically equip and operate the following lines of street car tracks over and upon the following streets in the city of Decatur:

Commencing at the city limits on Decatur Street, i. e. the street running along the north side of the Georgia Railroad and extending along said street east as far as Candler Street or the next street east of and parallel to Candler Street; thence along Candler Street or said next street east of and parallel to Candler Street, to Atlanta Avenue; thence west along Atlanta Avenue to McDonough Street; thence along McDonough Street to a connection with said line petitioner for on Decatur Street or road, with the right to make such sidings and turnouts as may be necessary.

346      And petitioners will ever pray.

COLLINS PARK AND BELT RAILROAD  
COMPANY,

By —————,  
*President.*

*Ordinance.*

STATE OF GEORGIA,  
*De Kalb County,*  
*Town of Decatur:*

Be it ordained, that from and after the passage of this ordinance that franchises be granted the Collins Park and Belt Railroad Company to build, electrically equip and operate an electric street rail-

road in the town of Decatur from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street thence along Broad Street to East Court Street or square, thence along East Court Street or square to South Court street or square, thence along South Court street or square to McDonough Street, thence along McDonough Street to North Railroad Avenue. Or to leave North Railroad Avenue at McDonough Street, thence direct along McDonough Street to Court square, thence east along South Court square to East Court square, thence north along East Court Square to Broad Street. Or to build, electrically equip and operate and an electric street railroad or any of the above named streets. Whenever this route runs along streets already occupied by the track of the Atlanta Railway Company the said track shall be removed and replaced by the said Collins Park and Belt Railroad Company and at the latter's expense, that the tracks of the two companies shall be as nearly as possible equally distant from the sidewalks except at corners. The track of the Collins Park & Belt Railroad Company shall be laid on the south side of Broad Street and Railroad Avenue and west side of McDonough Street, from the tracks of the Atlanta Railway Company.

347 The streets shall be left in as good condition, except for the tracks, as before the tracks were laid, and the tearing up and replacing the streets shall be done under the supervision of the street committee. The town of Decatur reserves the right to regulate the speed of cars, and the right to make all such regulations as pertain to the police power of Decatur. All overhead and other constructions shall be done in a reasonably safe manner and the street committee shall see to this, and all matters pertaining to grades shall be subject to the approval of the street committee.

E. H. MASON,  
Clerk Council, Decatur, Georgia.

EXHIBIT "A" CONTINUED.

*Grant by the Town of Decatur to Collins Park and Belt Railroad Company to Construct Line on North Railroad Avenue, Oak Street, Broad Street, East Court Street, South Court Street, and McDonough Street.*

September 4, 1899.

The following ordinance was read by Councilman Patillo, to wit:

"Be it ordained, that from and after the passage of this ordinance that franchise be granted the Collins Park and Belt Railroad Company to build, electrically equip and operate an electric street railroad in the town of Decatur, from the western town limits on North Railroad Avenue to Oak Street, thence along Oak Street to Broad Street, thence along Broad Street to East Court Street or square, thence along East Court Street or square to South Court Street or

square, thence along South Court Street or square to McDonough Street, thence along McDonough Street to North Railroad Avenue, or to leave North Railroad Avenue at McDonough Street, thence direct along McDonough Street to Court square, thence 348 east along South Court square to East Court square, thence north along East Court square to Broad Street, or to build, electrically equip and operate an electric street railroad on any of the above named streets, wherever this route runs along streets already occupied by the track of the Atlanta Railway Company, the said track shall be removed and replaced by the Collins Park and Belt Railroad Company, and at the latter's expense, so that the tracks of the two companies shall be as nearly as possible equally distant from the sidewalks, except at corners and the tracks of the Collins Park and Belt Railroad Company shall be laid on the south side of Broad Street and west side of McDonough Street from the tracks of the Atlanta Railway Company. The streets shall be left in as good condition except for the tracks, as before the tracks were laid, and the tearing up and replacing the streets shall be done under the supervision of the street committee. The Town of Decatur reserves the right to regulate the speed of cars, and the right to make all such regulations as pertain to police power of Decatur. All overhead and other construction shall be done in a reasonably safe manner, and the street committee shall see to this, and all matters pertaining to grades shall be subject to the approval of the street committee."

Moved that the above ordinance be adopted. After some discussion a vote was taken on adoption of the above ordinance and resulted as follows:

Voting yes: Councilmen Patillo, Johnson, Boyd, Galloway and Bates.

Voting no: Councilman Williams.

#### EXHIBIT "B."

*Grant by the Town of Decatur to W. I. Zachry, J. R. Mell, and A. S. Seals Along Green, Broad, and Other Streets.*

July 20, 1892.

To the Mayor and Council of Decatur, Georgia:

The petition of W. I. Zachry, J. R. Mell and A. S. Seals show- that they are forming a company to build, equip and operate an electric railroad from Atlanta eastward to Decatur, and that they desire for themselves, associates and assigns, the absolute franchise and right to build and run said railroad along and over the following streets in Decatur: From city limits along Green Street to Broad, along Broad to a point opposite Oak, along Oak to North Avenue, along North Avenue to Depot Street, along Depot Street to McDonough Street, along McDonough Street to South Court square, along South Court square to West Court square, along West Court square to Green Street.

Petitioners ask that they be allowed six months or other reasonable time in which to begin work, and six months additional in which to have said road running.

CLYDE BROOKS,  
*Petitioners' Attorney.*

The above petition was approved and granted with the following exceptions:

The time for the commencement of work on said road was required to be three months and to be completed in fifteen months.

Said road to be exempt from taxation for the term of twenty years.

The petition and amendments *was* then read and approved in open council.

Granted until January 1, 1893, in which to commence work.

350

November 7, 1892.

To the Mayor and Council of Decatur, Georgia:

The petition of W. I. Zachry, J. R. Mell and J. B. Zachry show that your Honorable Body granted them on July 21, 1892, franchise over certain streets in Decatur, provided work commenced within ninety days from July 21, 1892; that they have been unable to comply, and ask that further time of sixty days be granted them in which to commence said work.

C. L. BROOKS,  
*Petitioners' Attorney.*

Petitioners were granted till January 1, 1893, as asked for in which to commence work.

*Change to Route from Green to Atlanta Street.*

January 2, 1893.

To the Honorable Mayor and Council of Decatur, Georgia.

GENTLEMEN:

We, the Atlanta City Street Railway Company are the successors to Messrs. A. S. Seals, W. I. Zachry and J. R. Mell, and control by virtue of assignment from them the rights and franchises granted them by your Honorable Body for electric railway purposes.

We are actually at work grading the proposed line and have contracts let for the whole line.

We find the route entering Decatur via Green Street is impracticable for us to build, and we, therefore, petition your body to grant us the privilege of entering Atlanta Street at some point between the residence of J. B. Swanson and the shop of the said Mr. Swanson, thence to the court house square via said Atlanta Street.

This would make our route through your city as follows: which we ask that you approve thus: Atlanta Street to West Court Square,

351 West Court Square to North Court Square, North Court Square to Broad Street, Broad Street to end of street from which point we continue, by consent of owners, through private property until we strike the eastern end of North Railroad Avenue at intersection of Oak Street, thence along North Railroad Avenue to Depot Street, thence along Depot Street to McDonough Street, thence McDonough Street to South Court Square, South Court Square to beginning of Atlanta Street, where we connect with our main line. All of said line to be free from taxation for twenty years as per terms of original grant.

We petition that your Honorable Body grant our petition as asked and that the same be spread upon your minutes and a copy of resolution granting same be furnished us.

Very respectfully,

ATLANTA STREET RAILWAY COMPANY.

A. HAAS,

*President.*

J. B. ZACHRY,

*Secretary.*

Petition granted as asked for.

#### EXHIBIT "C."

Prior to April 14, 1919, applicant had in effect on its city and suburban lines, five cents fares with free transfers.

Effective August 14, 1919, a maximum fare of six cents was authorized where a five cents fare was then charged except as to fares between Atlanta and Decatur on the Main Decatur line and between Atlanta and College Park on the College Park line, fixed by contracts between the company and the towns of Decatur and College Park, held by the Supreme Court of Georgia to be valid.

Patrons on these two lines intermediate between Atlanta and Decatur and College Park pay six cent fares.

The five cent fare now in effect on the main Decatur and College Park lines, contracted for under vastly different conditions 352 than now exist, are not fairly compensatory, and as to the patrons of the company on other routes, and on intermediate territory on these routes, are discriminatory. This commission is without power to increase them.

It will be noted, however, that in the order authorizing the company to charge seven cents on its city and suburban lines, where zone charges are not in effect, increased facilities are required on the main Decatur and College Park routes, which will result in improved service.

Effective October 1st, 1920, applicant is hereby authorized to charge and collect as its maximum passenger fare, the sum of seven (7) cents per passenger, where a six (6) cent fare is now charged, for one continuous ride over and on its city and suburban lines of railway, or any zone thereof as now established, except such fares on the Main

Decatur and College Park routes as are fixed by contracts between the company and the cities of Decatur and College Park held by the Supreme Court of Georgia to be valid contracts.

#### Additional Service Facilities.

2. That as early as practicable, and if the necessary equipment can be secured within six months from October 1, 1920, applicant shall place in service on its city and suburban streets car routes, during the morning and afternoon rush hour periods as now established, additional seating capacity equal to twenty per cent. of the seating capacity now provided, except as to the Main Decatur and the College Park routes, on which two named routes, trailers shall be operated on each schedule now operated during the above mentioned rush hours.

Applicant is directed to report to the commission in writing not later than November 15th next, what steps it has taken to carry into effect the provisions of this requirement.

353 Filed in office this 20 day of Nov., 1920.  
B. F. BURGESS,  
*Clerk.*

Due and legal service of the within answer and cross bill is acknowledged. Copy received. This Nov. 19, 1920.

L. J. STEELE,  
FRANK HARWELL, &  
GREEN, TILSON & MCKINNEY,  
*Atty's for Plaintiff.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY and GEORGIA RAILWAY & ELECTRIC COMPANY.

Now comes the defendants, and by leave of court first obtained, amend their answer filed in the above stated cause as follows:

1. (a) The contract as to fares alleged is not a subsisting binding contract, under which defendants can be held to charge confiscatory rates.

(b) Said contract, if ever binding, was one at will and has been terminated by reasonable notice given by defendants, and has been abrogated by subsequent municipal and State action.

(c) Neither the plaintiff nor the defendants had any right, power or authority to make any binding contract as to fares. Under the constitution of this State, as set out in code sections 6389, 6463, 6464

and 6467, neither of the parties hereto can make any rate agreement for fixed, irrevocable fares; especially if such fares are or should become, as they have become in this case, confiscatory, in violation of the fourteenth amendment to the constitution of the United States.

354 2. If the courts should hold the alleged contract between the parties to be legal and binding, and if the courts should hold that the acts of August 17, 1914 (Georgia Acts 1914, page 703), and of August 19, 1916 (Georgia Acts 1916, page 681), extended this alleged contract to the territory added to the town of Decatur by said acts, so as to extend the claimed contract for a five cents fare over said territory, then said acts would and do impair the obligation of contracts, in contravention of article 1, section 10, of the constitution of the United States, as hereinbelow set out.

3. Under the constitution of Georgia, "The General Assembly shall not authorize the construction of any street railway within the limits of any incorporated town or city without the consent of the corporate authorities."

4. Prior to the 3d day of March, 1903, the said Georgia Railway & Electric Company occupied certain streets in the town of Decatur, upon which it had operated a street railway as successor in title to the Atlanta Railway Company, said railway extending over said streets of Decatur along their main line to the city of Atlanta.

5. Just prior to the contract and permission next below mentioned, said electric railway company had removed its tracks and structures for a considerable distance between the town limits of Decatur and the city of Atlanta, said removal extending up to the corporate limits of the town of Decatur; so that, while the tracks of the Atlanta Railway Company were then occupying the streets of the town, they did not form a part of the street railway then operated or possible to be operated.

6. To prevent the removal of the tracks of said railway from the streets of Decatur, a restraining order was sought and obtained from the judge of the superior court of Fulton county, upon petition of the town of Decatur against the Georgia Railway & Electric Company.

355 7. On April 1st, 1903, an agreement was had between the town of Decatur and the said Georgia Railway & Electric Company, by which the railway company was permitted to remove its said tracks from the streets of the town of Decatur, the material parts of which agreement were as follows:

(a) To never charge more than five cents for one fare upon its Main Decatur line, called the Rapid Transit line, for one passenger and one trip in its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur, or from the terminus of said line in the town of Decatur to the terminus of the same in the city of Atlanta; and the trip either way shall include the entire loop in the town of Decatur hereafter de-

scribed, though a greater fare may be charged when passengers are transported between the hours of midnight and five o'clock a. m.

(b) To grant one transfer ticket upon the payment of one full fare, for the purpose of giving one continuous ride from any point within the town of Decatur, upon said Rapid Transit line, to any point within the city of Atlanta on any of its lines in said city and vice versa. It does not result, however, in carrying the passenger on parallel line or in the same general direction from which he came.

(c) To gradually from time to time, as it may obtain permission to do so and may have funds available for such purpose, double track said Rapid Transit line from terminus to terminus, the loop already described in the town of Decatur being considered a double track.

8. The tracks of the Atlanta Railway Company were removed from the streets of Decatur. Thereafter only a five cents fare was charged on the Main Decatur line (now called the North Decatur line, and now the property of the Georgia Railway & Power Company) up to the filing of this suit, and under the injunction in this case is now being charged.

356 9. Under the statutes of Georgia no street or suburban rail-way can lay its tracks in the public roads of any county in said State without the consent of the proper authorities of said county.

10. On September 10, 1899, the county of De Kalb (in which is located the town of Decatur) upon petition of the Collins Park & Belt Line Railroad Company, predecessor in title of the Georgia Railroad & Power Company, granted to that company and its assigns the right and franchise to build and electrically equip and operate a street railroad in said county, commencing on the Decatur road, on the north side of the Georgia Railroad, at the county line between De Kalb and Fulton counties; running thence along said Decatur road all the way to the corporate limits of the city or town of Decatur; with the right to build all such sidings and turnouts as may be necessary and proper.

11. On December 12, 1906 the county of De Kalb permitted the laying of double tracks on the public roads just described, leading from the line of Fulton county east to Decatur, Georgia.

12. These permissions were granted prior to the extension of the town limits of Decatur, which was prior to the acts of 1914 and 1916, above referred to.

13. Said road is also the public highway extension of the streets of Decatur to the city of Atlanta, with reference to which the contract, supra, as to fares and transfers was made.

14. In these grants by De Kalb county there was no provision as to fares, although there were further conditions as to manner and time of construction. These grants were accepted by the railroad company and the track, and thereafter a double track was built and

put in operation from the city of Atlanta to the then corporate limits of the town of Decatur, under said county grants, connecting 357 with and forming a part of the railway on the streets of Decatur, the line being known as and called the Main or North Decatur line.

15. By virtue of the act of August 17, 1914, and the act of August 19, 1916, *supra*, the corporate limits of the town of Decatur were extended from the limits as they existed at the time of the rate and transfer contract, *supra*, for a distance of practically one mile along the Main Decatur line toward the city of Atlanta, thereby including within the limits of the town of Decatur about one mile of the main Decatur road then occupied by defendants' tracks under the De Kalb county grants *supra*.

16. Prior to the act of 1907 the railroad commission of Georgia had no jurisdiction over street railways. Such companies had, prior to that time, always fixed their own fares; but in that year the legislature extended the commission's jurisdiction so as to include all street railways, except that the commission was denied the power to "impair any valid, subsisting contract now (then) in existence between any municipality and any such company."

17. Prior to 1918, the defendants had, before 1907 and after that date, charged a flat fare of five cents. On the 2nd day of April, 1919, the railroad commission permitted defendants to charge a fare of six cents over all its lines, including the North Decatur line aforesaid, except as to that portion of the College Park line and that portion of said North Decatur line covered by the alleged contract; and by a later order of the commission a seven cents fare was permitted over all their lines, except as to College Park and the North Decatur lines covered by alleged contract.

18. A five cents fare was charged to all passengers entering and alighting from the cars within the corporate limits of Decatur, including the area which had been added by the acts of 1914, and 1916, along the main Decatur road, until the 5th day of October,

1920, when defendants notified the town of Decatur that if 358 there was any contract between the defendants and the town of Decatur, it was one at will, and that it would be terminated on the 20th day of October, 1920, and that thereafter a seven cents fare would be charged and collected. To prevent that, the present bill was filed and the present preliminary injunction granted, preventing the increased fare and maintaining the five cents fare, not only as to the old limits of Decatur, but as well to the added territory aforesaid.

19. The defendants allege that if the courts hold that the effect of the acts of 1914 and 1916 is to extend, by virtue of the claimed contract *supra*, between the town of Decatur and defendants, the five cents fare over the territory added to the town, then said acts will impair the obligations of the contract between defendants and the town of Decatur; for under that contract defendants were to charge

only five cents for one fare upon its Main Decatur line for one passenger and one trip in its regular cars from the terminus of said line in the city of Atlanta to the terminus of the same in the town of Decatur, and it is an extension and violation of the contract to extend this five cents fare from and to the area added to the limits of Decatur; and such construction will violate article 1, section 10, of the United States constitution prohibiting the impairment of contracts.

20. If the acts of 1914 and 1916 shall be construed to add the territory there added to the town of Decatur to the five cents area provided for in said contract, then said acts will impair the obligations of the contracts between the defendants and the county of De Kalb. If the consent given by the town of Decatur is a binding legal contract, the consent of the county of De Kalb as to the added area was also a binding legal contract. In the county consent contracts there were no provision- that only a five cents fare should be charged, and by adding to the De Kalb county contract the 359 conditions that the five cents provision is to be enforced in the added territory, the effect would be to impair the county's contracts and to that extent violate article 1, section 10, of the constitution of the United States prohibiting States from impairing contracts.

21. If the courts shall so construe the act of 1907, page 73 et seq., excepting from the commission's control, all valid subsisting contracts between street railway and municipal corporation, so as to except from the commission's control all points without the town of Decatur to all parts of Decatur, and from all parts of Decatur except from the terminus of the Main Decatur line, to all points without the town of Decatur, then the said act of 1907 impairs the obligations of the contract between the town of Decatur and these defendants and violates article 1, section 10, of the constitution of the United States, preventing the impairment of contracts.

The commission has fixed fares of seven cents to all points on said railway system, except as protected by said claimed contract; and to prevent the charge of seven cents from and to the point above stated, the courts must find that these points are taken from the commission's jurisdiction by the act of 1907.

22. If the court shall construe the orders of the commission fixing the six and seven cents fares to except from the operation of those orders fares from and to any point except the fares from the terminus of said railway in Decatur to the terminus of said railway in the city of Atlanta, then such orders of the commission will impair the obligations of the contract between the town of Decatur and these defendants, in violation of article 1, section 10, of the United States constitution prohibiting the impairment of contracts.

23. The five cents fare of the claimed contract is confiscatory, also twice found to be so by the railroad commission after 360 exhaustive hearings. The judicial enforcement of the five cents fare in the Decatur territory, in the absence of a con-

tract between the parties, would clearly be illegal and in violation of the fourteenth amendment to the constitution of the United States which prohibits the State from depriving any person of life liberty of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

24. When complaint is made that property is being confiscated and when such confiscation is sought to be excused by producing a contract permitting it, the Federal courts, as well as all other courts will, for themselves and independently, look to see if there is, in fact, such a claimed contract, and if not such contract is found the confiscatory rate will not be enforced.

25. The defendants allege that there is no subsisting legal binding contract between them and the town of Decatur. Neither the town nor the defendants had the power to make such a contract either by charter or by the general laws of the State of Georgia.

26. Such a contract would violate article 4, sec. 2, par. 1, of the constitution of the State (Code Sec. 6463), which restricts to the legislature the power to fix freight and passenger tariffs, and denies such power to cities and street railroads.

27. Said contract also violates article 4, sec. 2, par. 2 of the State constitution (Code Sec. 6464) which provides that "the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal protection of individuals or the general well being of the State." The claimed contract of definite duration for a fixed fare, no matter what change of conditions, clearly violates this provision of the constitution.

361 28. Said contract also violates article 1, sec. 3, par. 2 of the State constitution (Code Sec. 6389), which provides that "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligations of contract, or making irrevocable grants of special privileges or immunities shall be passed." This claimed contract, in words insured irrevocable grants of special privileges and immunities, in the teeth of this provision.

29. These defendants allege, as shown supra, that this claimed contract is clearly illegal, void and non-subsisting, and that it will not preclude the federal courts, from exercising their jurisdiction to enforce the fourteenth amendment; if so, it can be defeated by anything in the form of a contract, no matter how illegal or invalid.

30. Defendants allege that the claimed contract, when made, if ever it was, was made with reference to the quantity, and quality of service then in force. To increase the quantity or quality of service is to increase the cost of the service, and a forced increase of the quantity or quality of the service, the contract remaining in force, is an impairment of the contract between the parties. If the court construes (as it must if it makes this injunction permanent) the act of 1907, page 73 et seq., so as to give the railroad commission power to in-

crease the quantity and quality of the service, then the contract between the parties will be impaired, in violation of article 1, sec. 10, of the constitution of the United States, against the impairment of contracts.

31. The railroad commission has by orders increased, since the act of 1907, the quantity and quality of the service in, to and from Decatur. If the court does not so construe the act of 1907, then the orders of the commission, being the act of the State, by increasing the cost of service, violates and impairs the contract between the parties, in violation of article 1, section 10, of the United States constitution, prohibiting the impairment of contractual obligations by the State.

J. PRINCE WEBSTER,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
COLQUITT & CONYERS,  
*Attorneys for Defendants.*

GEORGIA,

*Fulton County:*

Before me personally appears P. S. Arkwright, president of the Georgia Railway & Power Company, who upon oath, deposes and says that the facts stated in the above and foregoing amendment are true as they stand stated. Deponent further swears that at the time of filing the original answer in the above and foregoing case the new facts and defense herein set out in this amendment to the answer were not omitted for the purpose of delay, and that this amendment is not offered for delay.

P. S. ARKWRIGHT.

Sworn to and subscribed before me. This 2d day of November, 1921.

[N. P. Seal.]

B. T. SIMPSON,  
*Notary Public, Fulton County, Georgia.*

GEORGIA,

*Fulton County:*

Before me personally appears W. H. Wright, secretary of the Georgia Railway & Electric Company, who upon oath deposes and says that the facts stated in the above and foregoing amendment are just and true as they stand stated. Further deposing, he says that at the time of filing the original answer in the above and foregoing case the new facts and defense herein set out in this amendment to the answer were not omitted for the purpose of delay and that this amendment is not offered for delay.

W. H. WRIGHT.

Sworn to and subscribed before me. This 2d day of November 1921.

[N. P. Seal.]

B. T. SIMPSON,  
*Notary Public, Fulton County, Georgia.*

363      Due and legal service acknowledged of the within & foregoing amendment. Copy received. Nov. 4th, 1921.

J. HOWELL GREEN,  
HARWELL, FAIRMAN & BARRETT,  
*Attorneys for Petitioner.*

Allowed and ordered filed subject to demurrer. Nov. 7th, 1921.

JOHN B. HUTCHESON,  
*Judge Supr. Ct., Stone Mountain Circuit.*

Filed in office Nov. 7, 1921.

B. F. BURGESS,  
*Clerk.*

De Kalb Superior Court.

No. 2497.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY et al.

Now comes the defendants in the above stated case, and by leave of the court first had and obtained, amend their answer and amended answer in said cause as follows:

(1) The line of street railway belonging to the defendants and known as the North Decatur line as it proceeds easterly towards the city of Atlanta from the old corporate limits of the town of Decatur as they existed at the date of the claimed contract of 1903; to the present extended corporate limits of Decatur ran either upon a public road and was built thereon by the permission of the county of De Kalb as set out in the amended answer, or upon a private right of way owned by defendants. From the old corporate limits of the town of Decatur said double tracked line ran upon a public road of De Kalb county for, to wit, nine hundred and forty-five (945) feet, then along the private right of way of defendants two hundred and ten (210) feet, thence upon a private right of way, part of which subsequently became a public road, one hundred and ninety-five (195) feet, thence upon a private right of way two thousand four hundred and fifty-eight (2,458) feet.

(2) For the reasons set out in the answer and amended answer the acts extending the corporate limits of the town of Decatur are unconstitutional and said acts cannot legally or constitutionally ex-

tend the alleged contract of 1903, with reference to fares, over said portions of said line.

J. PRINCE WEBSTER,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
COLQUITT & CONYERS,  
*Attorneys for Defendants.*

GEORGIA,

*Fulton County:*

Before me personally appears P. S. Arkwright, president of the Georgia Railway & Power Company, who upon oath deposes and says that the facts stated in the above and foregoing amendment are true as they stand stated. Deponent further swears that at the time of filing the original answer in the above and foregoing cause the new facts and defense herein set out in this amendment to the answer were not omitted for the purpose of delay, and that this amendment is not offered for delay.

P. S. ARKWRIGHT.

Sworn to and subscribed before me. This 3 day of December, 1921.

[N. P. Seal.]

INEZ BOINEST,  
*Notary Public, Fulton County, Georgia.*

GEORGIA,

*Fulton County:*

Before me personally appears W. H. Wright, secretary of the Georgia Railway & Electric Company, who upon oath deposes and says that the facts stated in the above and foregoing amendment are just and true as they stand stated. Further deposing, he says that at the time of filing the original answer in the above and foregoing cause the new facts and defense herein set out in this amendment to the answer were not omitted for the purpose of delay and that this amendment is not offered for delay.

W. H. WRIGHT.

Sworn to and subscribed before me this 3 day of December, 1921.

[N. P. Seal.]

INEZ BOINEST,  
*Notary Public, Fulton County, Georgia.*

The within amendment allowed and ordered filed as a part of the record in said case, subject to demurrer.  
Dec. 10th, 1921.

JOHN B. HUTCHESON,  
*J. S. C., S. M. C.*

Filed in office Dec. 10, 1921.

B. F. BURGESS,  
*Clerk.*

De Kalb Superior Court.

No. —.

TOWN OF DECATUR

v.

GEORGIA RAILWAY & POWER COMPANY and GEORGIA RAILWAY  
ELECTRIC COMPANY.

And now comes R. C. Hackman, C. H. Knox, G. R. Macnamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. Murohy, J. R. Hardin, M. H. Ashe, P. R. Davis, C. E. Bennett, E. Field, M. E. Hawn, David Hawn, F. McDonald, Jr., J. J. Gorman for themselves and for others similar- situated and pray the court that they be made parties defendant in the above stated case, with permission to file answer and cross bill in the above stated case, and show and allege as follows:

(1) R. C. Hackman, C. H. Knox, F. McDonald, Jr., J. C. Gorman, G. R. Macnamara and J. T. Braswell are citizens and residents of De Kalb county, Georgia, and of the city of Atlanta, and 366 citizens and residents of that part of said municipality, which was formerly known and incorporated as Edgewood. The said parties and each of them use the lines of the defendant companies, and especially use the line of the defendants known as the Main or North Decatur line as a means of transportation from the said residence to and from the business section of the city of Atlanta.

(2) C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy and J. R. Hardin are citizens and residents of De Kalb county, Georgia, and are citizens and residents of the municipality known as Kirkwood and that each of them use the lines of defendant companies and also especially use one of the lines of defendant companies known as the Main or North Decatur line as a means of transportation to and from said municipality of Kirkwood to Atlanta, and the business sections of Atlanta.

(3) W. E. Field, M. E. Hawn and David Hawn are citizens and residents of the county of De Kalb and live in or near that portion of De Kalb county which was formerly known as Edgewood and such citizens and residents use the lines of defendant companies and especially use the Main Decatur line of defendant companies as a means of transportation from their residences or places of abode and from Atlanta and the business portion of said city of Atlanta.

(4) H. M. Ashe, P. E. Davis and C. E. Bennett are citizens and residents of De Kalb county and live in the municipality known as East Lake, Ga., and as such residents use the car line of defendant in going to and from their residences to the business section of the city of Atlanta and especially use the car line known as the South Decatur car line.

(5) Intervenors show that in the use of said street and suburban railway lines of the Georgia Railway & Power Company and the Georgia Railway & Electric Company, they use the same mostly in going from and to their respective residences and the business section of the city of Atlanta, and that in using said car lines intervenors are charged and required to pay rates of fares which have been fixed by the State of Georgia through its railroad commission, and that intervenors pay 7 cents per passenger on the lines of the portions of the lines thus used by them.

(6) Intervenors show that the distance from the town of Decatur and from the terminus in the town of Decatur of what is known as the Main or North Decatur line to the business section or center of the city of Atlanta or the terminus of said Main or North Decatur line in Atlanta, is approximately 6½ miles and that the fare charged for patrons riding to and from Atlanta and Decatur on said Main or North Decatur line is 5 cents per passenger.

(7) Intervenors show that the distance from Kirkwood on said Main or North Decatur line to the terminus of said line in the center or business portion of Atlanta is approximately four (4) miles and that fare charged the patrons for said ride to and from Kirkwood and Atlanta on said Main or North Decatur line is seven (7) cents per passenger for each trip. Intervenors say that thus for the shorter haul and less service on the said Main or North Decatur line a charge of seven (7) cents per passenger is charged to all patrons riding on said line to and from Atlanta and intermediate points between Atlanta and the western limits of the town of Decatur; whereas the charge of only 5 cents is made to ride to and from Atlanta and Decatur.

(8) Intervenors living in that part of De Kalb county and within the present limits of the city of Atlanta, and within or near what was formerly known as the municipality of Edgewood show that said Main or North Decatur line goes through said section of Atlanta and that said line is used by intervenors in going to and from their respective residences and the business section of the city of Atlanta, and that the distance travelled by intervenors is approximately 2½ miles for which intervenors are required to pay a fare of 7 cents per passenger for each ride.

(9) Intervenors living at East Lake show that the Georgia Railway & Power Company operates a line known as the South Decatur line which runs from the city of Atlanta to Decatur, the length of said line being practically the same as the length of the Main or North Decatur line; that from this line at what is known as the East Lake Junction one branch of said South Decatur line goes to East Lake, Georgia, and another branch of said line goes to and then runs within the corporate limits of the town of Decatur. Intervenors show that the distance from East Lake to Atlanta is not greater than the distance from Decatur to Atlanta over the Main or North Decatur line. All patrons using said South Decatur line and boarding

said line at Decatur East Lake, Kirkwood or within the city limits of Atlanta pay the sum of 7 cents per passenger for a ride.

(10) Intervenors show that all patrons and residents of all communities or municipalities on said South Decatur line pay 7 cents per passenger, whereas passengers riding on the Main or North Decatur line to and from Atlanta and Decatur pay only 5 cents per passenger and ride from one-third to one-half greater distance or much more than twice the distance as that ridden by the majority of patrons on the said South Decatur line.

(11) Intervenors residing in or near what was formerly Edgewood and in Kirkwood and using the Main or North Decatur line use the same cars and schedules and enjoy the same facilities in the short distance they travel as are enjoyed by the patrons of said Main or North Decatur line in going to and from within the limits of Decatur to the business section of Atlanta, for which, as already shown, intervenors pay 7 cents whereas what is known as the

369 Decatur traffic is required to pay only 5 cents per passenger.

(12) Intervenors living on said Main or North Decatur line and patrons of defendants using said Main or North Decatur line from other points than within the limits of Decatur enjoy no greater facilities, if indeed so great, as do the parties traveling from within the corporate limits of the town of Decatur to the business section of the city of Atlanta, and yet for the distance traveled by intervenors and said other patrons in reaching their destination, which is from one-third to one-half to one-fourth less in distance than from the town of Decatur to the city of Atlanta, they are required to pay 7 cents per passenger, whereas those travelling from the town of Decatur on the Main or North Decatur line to and from the business center of Atlanta are required to pay only 5 cents per passenger.

(13) All the intervenors herein for themselves and for other similarly situated show that to permit citizens of the town of Decatur to pay for fare over the whole system of the Georgia Railway & Power Company only the sum of 5 cents if they use the Main or North Decatur line and board or disembark from said line within the corporate limits of Decatur, whereas each of your intervenors are required to pay 7 cents, is a gross discrimination against each of your intervenors and against all other persons similarly situated and against all the citizens of the city of Atlanta and of the other localities and municipalities located upon the lines of the defendant companies and against the citizens of Decatur using the South Decatur line, save only those on or using the Main or North Decatur line from or to within the limits of Decatur, and intervenors show and allege for themselves and others similarly situated that the claimed contract provision between the town of Decatur and the defendants is discriminatory, illegal, void and unconstitutional.

370 (14) Intervenors for themselves and others similarly situated show further that a car fare of 5 cents from within the limits of Decatur on the Main or North Decatur line, whereas 7 cent

is charged from all other localities, save only as to what is called College Park traffic on the College Park line is discriminatory as against all the municipalities and communities using the street railway as means of transportation; and is a gross discrimination against the communities in which intervenors reside and therefore said contract is illegal, void and unconstitutional.

(15) Intervenors residing on or near said Main or North Decatur line in the municipality formerly known as Edgewood and within the municipality of Kirkwood, especially allege that a 5 cents rate of fare to and from Decatur and Atlanta on said Main or North Decatur line is and will continue to be grossly discriminatory against the section of Atlanta formerly known as Edgewood and against the municipality of Kirkwood, both of which sections or municipalities lie between Decatur and the business portion of the city of Atlanta and that said sections and said municipalities are in competition with Decatur in progress and upward movement; and that to permit one section or one municipality a fare of five cents and to deny it to another is grossly discriminatory against the Edgewood section and against the municipality of Kirkwood and against the residents of said section and said municipality; especially is this so when it is true that the citizens of Decatur claiming the right to ride for a five cent fare use the identical cars and exactly the same facilities, and in fact pass through Kirkwood, and the section generally known as Edgewood in their journey to and from Decatur and Atlanta.

(16) Intervenors on information and belief adopt as true and as a part of this intervention all the allegations contained in the answer and cross bill filed by the Georgia Railway & Power Company and Georgia Railway & Electric Company in the within suit; and intervenors further say and allege, on information and belief, that said so called contract provision with reference to fares is terminated, illegal and void and is unconstitutional and unenforceable for all the facts herein set out and for all the reasons and facts set out in said answer and cross bill; and intervenors adopt each and every one of said allegations and each constitutional allegation therein set out without specifically setting them out in this intervention.

Wherefore, intervenors pray:

- (a) That they be made parties defendant in said case.
- (b) That said so called contract provision with reference to Decatur traffic be declared by this court to be illegal and void and unconstitutional, and of no force and effect.
- (c) That the parties hereto, to wit: The Town of Decatur, The Georgia Railway & Power Company and the Georgia Railway & Electric Company be enjoined from hereafter asserting said illegal contract for the payment of said five cents fare, said contract being discriminatory and illegal as against intervenors, and as against the localities and municipalities where intervenors live.

(d) That intervenors may have such other relief as to the court may seem meet and proper.

J. PRINCE WEBSTER,  
ROSSER, SLATON, PHILLIPS &  
HOPKINS,  
COLQUITT & CONYERS,

*Attorneys for Intervenors.*

372 GEORGIA,

*Fulton County:*

Before me personally appeared — — —, one of the persons named as intervenors in the above intervention, who being duly sworn, deposes and says that the facts set out in the above and foregoing intervention are true as they there stand stated.

R. C. HACKMAN.

Sworn to and subscribed before me this November 18th, 1920.

[N. P. Seal.]

W. O. BROOKS,

*Notary Public, State at Large, Ga.*

Read and considered: Let the intervenors be made parties defendant as prayed for; and it is ordered that they be permitted to file the answer and cross bill herein presented subject to objection & demurrer. This November 19th, 1921.

JOHN B. HUTCHESON,  
*Judge Superior Court, Stone Mountain Circuit.*

Filed in office, this 20 day of Nov. 1920.

B. F. BURGESS,

*Clerk.*

We the jury find the issues in this case in favor of plaintiff Town of Decatur, and against the defendants, Georgia Railway & Power Company and Georgia Railway and Electric Company, with costs against defendants. This 15th day of December, 1921.

J. H. JOHNSTON,  
*Foreman.*

The jury in the above stated case having found the issues in favor of the plaintiff, whereupon it is considered, ordered, adjudged and decreed by the court that the injunction is granted as prayed for in the petition of the plaintiff and the amendment thereto and said injunction is made permanent; and it is further ordered and decreed that the defendants, Georgia Railway and Power Company and Georgia Railway and Electric Company, their officers, agents, employes and servants be and they are hereby permanently restrained and enjoined in all respects and particulars as prayed for by plaintiff, Town of Decatur, in its petition and in the amendment to said petition, and all the relief prayed for in said petition and the amendment thereto is hereby granted; and it is further ordered and decreed that the plaintiff do have and recover

of and from the defendants the sum of \$— costs, for use of officers of the court. In open court, this December 16th, 1921.

JOHN B. HUTCHESON,

*Judge Superior Courts of the Stone Mountain Circuit.*

Superior Court of De Kalb County,  
Clerk's Office.

Decatur, Ga., January 3, 1922.

I hereby certify that the foregoing pages hereto attached contain a true and complete transcript of such parts of the record in the case therein stated as are in the bill of exceptions specified, and that the December, 1921, term of said court at which said case was tried has not adjourned.

Witness my signature and the seal of said court hereto affixed, the day and year first above written.

[SEAL.]

B. F. BURGESS,

*Clerk.*

374 [Endorsed:] Case No. 3019. March Term, 1922. Supreme Court of Georgia. Georgia Ry. & Power Co. et al. versus Town of Decatur. Transcript of Record. Filed in office January 4, 1922. W. E. Talley, D. C. S. C. Ga.

375 Supreme Court of Georgia,  
Clerk's Office.

Atlanta, Ga., June 28, 1922.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and the original citation, and also true and complete copies of the parts of the record specified in the præcipe in the case of Georgia Railway & Power Co. et al., plaintiffs in error, vs. Town of Decatur, defendant in error, the same being case No. 3019, March Term, 1922, of the Supreme Court of Georgia, as appears from the records and files of this office.

Witness my signature and the seal of the Supreme Court of the State of Georgia hereto affixed the day and year first above written.

[Seal of Supreme Court of the State of Georgia.]

Z. D. HARRISON,  
*Clerk Supreme Court of Georgia.*

Endorsed on cover: File No. 29,013. Georgia Supreme Court. Term No. 463. Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, et al., plaintiffs in error, vs. The Town of Decatur. Filed July 5th, 1922. File No. 29,013.

Office Supreme Court, U. S.  
FILED

APR 23 1923

WM. R. STANSBURY  
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1922.

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**No. 463.**

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GEORGIA RAILWAY & POWER CO., GEORGIA RAIL-  
WAY & ELECTRIC CO., R. C. HACKMAN ET AL.,  
PLAINTIFFS IN ERROR AND PETITIONERS IN CERTIORARI,  
*versus*  
THE TOWN OF DECATUR, DEFENDANT IN ERROR AND  
RESPONDENT IN CERTIORARI.

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**SUPPLEMENTAL BRIEF FOR DEFENDANT  
IN ERROR.**

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Counsel for the Town of Decatur desire to add to their brief  
the following authorities under the respective captions here-  
inafter referred to, to wit:

Caption I, Page 12.

Defiance Water Co. *vs.* Defiance, 191 U. S., 184.  
Northern Pacific Ry. Co. *vs.* Solum, 247 U. S., 477.

Also the following:

Northern Pacific R. R. Co. *vs.* Ellis, 144 U. S., 458.  
 Great Western Tel. Co. *vs.* Burnham, 162 U. S., 339.  
 Mutual Life Ins. Co. *vs.* Kirchoff, 169 U. S., 103.  
 Yazoo and Miss. Valley Ry. Co. *vs.* Adams, 180  
 U. S., 1.

How constitutional question raised a matter of State practice:

N. C. R. Co. *vs.* Zachary, 232 U. S., 248.  
 L. & N. R. Co. *vs.* Woodford, 234 U. S., 46.  
 Laffitte *vs.* Burke, 113 Ga., 1000.  
 Savannah, Fla. and Western Ry. Co. *vs.* Hardin, 110  
 Ga., 433 (1).  
 Carswell *vs.* Wright, 133 Ga., 714 (4).

Caption II, Page 14.

Tippecanoe County *vs.* Lucas, 93 U. S., 108.  
 Mower *vs.* Fletcher, 114 U. S., 127.  
 Atherton *vs.* Fowler, 91 U. S., 143.  
 Moody *vs.* Muscogee Mfg. Co., 134 Ga., 730.  
 Booth *vs.* State, 131 Ga., 756.

Binding effect of prior decree a State matter:

King *vs.* West Va., 216 U. S., 92.

Brief, page 16, Caption IV:

See City of Mitchell *vs.* Telephone Co., 25 S. Dak., 409, the consent clause of the Constitution, p. 415, being the same as in the Georgia Constitution.

4 McQuillan on Municipal Corp., §1644, p. 3446, and §1738, p. 3719.

Brief, page 22, Caption IV (b):

Allegheny City *vs.* Railway, 159 Pa. St. R., 416, where the court says, referring to the city's consent power: "I have the sole and exclusive power to consent or refuse; on certain conditions I consent, otherwise I refuse. I don't compel you to do anything; I merely give you a choice between alternatives. You have no power or right to demand my consent; you ask it, and I give it on my own terms or not at all."

Brief, page 39, Caption VI:

City of Scranton *vs.* Public Service Commission, 268 Pa. St. R., 192. Especial attention is directed to this case, because the consent clause of Pennsylvania Constitution, p. 194, and the constitutional provision forbidding the abridgement of the police power, page 197, are identical with the provisions of Georgia Constitution on the same subjects. See sections 6448 and 6464 of Park's Ann. Code.

See also:

Chicago, B. & Q. R. R. *vs.* Nebraska, 170 U. S., 57;  
Puget Sound Traction Co. *vs.* Reynolds, 244 U. S., 575;  
Woodburn *vs.* Public Service Commission, 82 Ore., 114,

where, on page 127, a very clear distinction is made between the right of the State to regulate rates under its police power and the contractual right of a city in reference to rates in the following language: "The right of the State to regulate rates by compulsion is a police power, and must not be confused with the right of a city to exercise its contractual power to agree with a public service company upon the terms of a

franchise. The exercise of a power to fix rates by agreement does not include or embrace any portion of the power to fix rates by compulsion. When Woodburn granted the franchise to the telephone company, the city exercised its municipal right to contract, and it may be assumed that the franchise was valid and binding upon both parties until such time as the State saw fit to speak; but the city entered into the contract subject to the reserved right of the State to employ its police power and compel a change of rates, and when the State did speak, the municipal power gave way to the sovereign power of the State."

Brief, page 41, Caption VII:

Under the proposition stated on page 42 to the effect that the whole body of rates must be considered and not the rate on a segregated line.

Puget Sound Traction Co. *vs.* Reynolds, 244 U. S., 574, distinguishing Northern Pacific Ry. Co. *vs.* North Dakota, 236 U. S., 585, and other cases cited on page 51 of brief of plaintiffs in error.

Caption X, Page 52.

Validity of State statute; decision by State court is final:

Smith *vs.* Jennings, 206 U. S., 276.

State of Montana *vs.* Rice, 204 U. S., 291.

Caption XIV, Page 61. .

Macon Railway and Light Co. *vs.* Corbin *et al.*, No. 3011, in Supreme Court of Georgia, recently decided. (See certified copy of opinion.)

Respectfully submitted.

FRANK HARWELL,  
J. HOWELL GREEN,  
*Of Counsel for Town of Decatur.*

(9194)

Office Supreme Court  
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WM. R. STANS

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IN THE SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM, 1922.

No. 463.

GEORGIA RAILWAY & POWER COMPANY, ET AL.,  
PLAINTIFFS IN ERROR AND PETITIONERS IN  
CERTIORARI.

vs.

TOWN OF DECATUR, DEFENDANT IN ERROR AND  
RESPONDENT IN CERTIORARI.

On writ of error and petition for certiorari to the  
Supreme Court of the State of Georgia.

MOTION BY PLAINTIFFS IN ERROR AND  
PETITIONERS IN CERTIORARI TO ADVANCE

WALTER T. COLQUITT  
J. PRINCE WEBSTER  
LUTHER Z. ROSSER  
ATTORNEYS FOR MOVANTS,  
PLAINTIFFS IN ERROR  
AND  
PETITIONERS IN CERTIORARI.

IN THE  
**Supreme Court of the United States**  
**OCTOBER TERM, 1922**

GEORGIA RAILWAY & POWER COMPANY,  
GEORGIA RAILWAY & ELECTRIC COMPANY,

R. C. Hackman, C. H. Knox, G. R. MacNamara,  
J. T. Braswell, C. A. Virgin, J. D. Malsby,  
C. M. Binder, J. L. Murphy, J. R. Hardin,  
H. M. Ashe, P. E. Davis, C. E. Bennett,  
W. E. Field, H. E. Hawn, David Hawn,  
F. McDonald, Jr., and J. C. Gorman

Plaintiffs in Error

Number  
463

and

Petitioners in Certiorari

vs.

TOWN OF DECATUR,  
Defendant in Error

and

Respondent in Certiorari

**MOTION TO ADVANCE.**

Georgia Railway & Power Company, et al., plaintiffs in error and petitioners for Certiorari, move that the above stated cases (docketed as No. 463) be advanced for hearing at an early date, for the following reasons:

1. The above stated case is pending on writ of error and also on petition and application for certiorari, directed to the Supreme Court of the State of Georgia.
2. The questions involved in said cases are as follows:

(a) Whether the municipal action of the Town of Decatur in 1903 was a rate ordinance or a rate contract. If a rate ordinance it is clearly and without dispute confiscatory and unconstitutional.

(b) Whether the said rate ordinance or contract is so discriminatory as to deprive intervenors and all other patrons of the street railway company not boarding or alighting from cars within the limits of the Town of Decatur of the equal protection of the law guaranteed by the 14th amendment to the Constitution of the United States.

(c) If the municipal action of the Town of Decatur in 1903 be held to be a rate contract; whether certain subsequent acts of the State of Georgia and orders of the Railroad Commission of the State of Georgia, enlarged, extended and imposed additional burdens upon the obligations of said contract and upon the obligations of prior contracts so as to render the said acts and the orders of the Commission unconstitutional and illegal in violation of Article 1 Section 10 of the Constitution of the United States.

(d) Whether the municipal action of the Town of Decatur of 1903 violated the 14th Amendment to the Constitution of the United States when construed by the State court as forcing the Georgia Railway & Power Company to continue to operate the North Decatur line when it is undisputed that to do so costs the company very much more than it receives from its fares, and is, therefore confiscatory.

(e) Whether certain acts of the State of Georgia, construed by the highest court of Georgia, as placing under the jurisdiction of the Railroad Commission of Georgia the authority to fix and establish rates in some cases and denying jurisdiction over rates in other cases, renders said acts unconstitutional in that it deprived petitioners of the equal protection of the law and fixed a discriminatory, confiscatory and illegal scheme of rates in violation of the 14th Amendment to the Constitution of the United States.

3. The matters here involved are of great public interest;

the constitutionality of several acts and of acts conferring jurisdiction over rates upon the Railroad Commission of the State of Georgia, as well as certain orders of the commission are involved; and the determination of these questions are of pressing importance, not only to the public service corporation, but to the State itself.

4. The early decision of this case is exceedingly important to the street railway company and to all its patrons, except such as enter and depart from cars in the limits of the Town of Decatur, for under the municipal action in question and under the orders of the Railroad Commission of the State of Georgia all the patrons riding upon any of the lines of the Georgia Railway & Power Company are charged a fare of 7 cents, except those boarding or alighting from cars within the corporate limits of the Town of Decatur (and the City of College Park) and these latter pay a fare of only 5 cents and enjoy transfer privileges entitling them to ride over all the street railway lines of the Georgia Railway & Power Company for a 5 cents fare, although all the other patrons are charged 7 cents.

It costs the Georgia Railway & Power Company more than double the fare of 5 cents to transport Decatur patrons and necessarily this over-cost is inflicted upon the Georgia Railway & Power Company or is borne by other patrons of the Street Railway Company. This palpable and gross discrimination is not only hurtful to the Georgia Railway & Power Company and its patrons, but is a constance source of annoyance to the public. The Railroad Commission of the State of Georgia has disapproved and expressly declared the Decatur rate to be both discriminatory and confiscatory and regretted their inability to correct it and urged correction thereof by the Town of Decatur.

The continuation of such discrimination "leads to consequences dangerous to public interest, peace and tranquility the extent of which it would be difficult in advance to perceive" (194 U. S. 517) and renders the determination of

the questions raised in this case of pressing importance to the State, as well as to the public service corporations.

WALTER T. COLQUITT

J. PRINCE WEBSTER

LUTHER Z. ROSSER

Attorneys for Movants  
Plaintiffs in Error  
and  
Petitioners in Certiorari

TO:

TOWN OF DECATUR AND ITS COUNSEL

J. Howell Green; Harwell, Fairman & Barrett  
and Frank Harwell.

You are hereby notified that on the 2nd day of January, 1923, or as soon thereafter as the same can be presented, the foregoing motion and application for the advancement of the above named case, will be presented to the Supreme Court of the United States for appropriate action thereon.

This 12th day of December, 1922.

WALTER T. COLQUITT

J. PRINCE WEBSTER

LUTHER Z. ROSSER

Attorneys for Movants  
Plaintiffs in Error  
and  
Petitioners in Certiorari

Service of the above and foregoing motion and application for advancement and of the notice of presenting the same

is hereby acknowledged, service and receipt of copy of said motion and notice are hereby accepted and acknowledged.

This 12th day of December, 1922.

J. HOWELL GREEN

HARWELL, FAIRMAN & BARRETT

FRANK HARWELL

Attorneys for Town of Decatur.

FILED

APR 12 19

WM. R. STAN

**BRIEF FOR DEFENDANT IN ERROR**

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**In The Supreme Court  
OF THE  
United States**

**OCTOBER TERM, 1922,**

**No. 463.**

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**GEORGIA RAILWAY & POWER COMPANY, GEORGIA  
RAILWAY & ELECTRIC COMPANY, R. C. HACKMAN, et al.,  
Plaintiffs in Error and Petitioners in Certiorari,**

**versus**

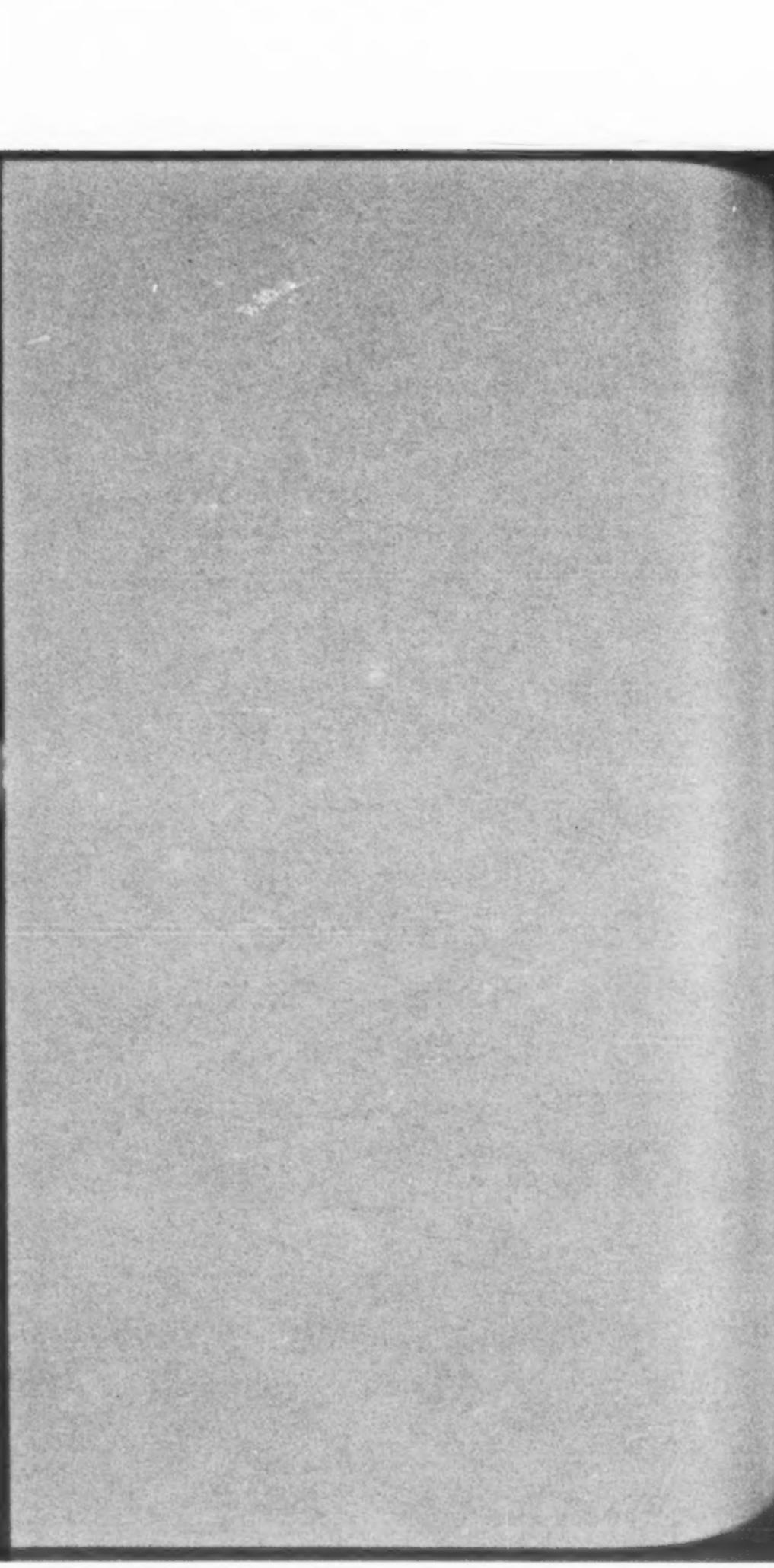
**THE TOWN OF DECATUR,  
Defendant in Error and Respondent in Certiorari.**

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**FRANK HARWELL and J. HOWELL GREEN,  
Counsel for Defendant in Error.**

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(29,013)

# Supreme Court of the United States

OCTOBER TERM, 1922,

No. 463.

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GEORGIA RAILWAY & POWER COMPANY, GEORGIA  
RAILWAY & ELECTRIC COMPANY, R. C. HACKMAN,  
ET AL.,

Plaintiffs in Error,

versus

THE TOWN OF DECATUR,

Defendant in Error.

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IN ERROR TO THE SUPREME COURT OF GEORGIA.

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Brief for Defendant in Error.

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## STATEMENT OF THE CASE.

On the 19th day of October, 1920, the Town of Decatur filed its equitable petition to the Superior Court of DeKalb County, Georgia, seeking an injunction against the plaintiffs in error, Georgia Railway & Power Company (hereinafter called the Power Company) and Georgia Railway and Electric Company (hereinafter called the Electric Company) to restrain them from raising the rate of fare on one of their lines of street railway running from the City of Atlanta to the Town of Decatur. (Transcript pp. 40-69.)

The petition was amended November 26, 1920. (Transcript pp. 69-189.) The Power Company and Electric Company filed their answer and cross petition November 20, 1920. (Transcript pp. 218-245.)

The Town of Decatur demurred to the answer and cross petition of the Power Company and the Electric Company November 26, 1920. (Transcript pp. 189-207.)

R. C. Hackman and other parties intervened, and were made parties defendant November 20, 1920. (Transcript pp. 254-258.) The Town of Decatur demurred to this intervention (Transcript pp. 215-217) and also filed its plea to same. (Transcript pp. 212-214.)

An interlocutory hearing was had at this stage of the pleadings before the court and the restraining order granted by the court October 19, 1920 (Transcript p. 50) was continued of force. This order appears to be omitted from the record, but the opinion of the Supreme Court of Georgia affirming it is set out. (Transcript pp. 19-23.)

Before the case was again tried in the Superior Court of DeKalb County by the court and jury the Power Company and the Electric Company filed several amendments to their answer and cross petition. (Transcript pp. 245-253.)

The Town of Decatur, upon the filing of these amendments, renewed its demurrer and demurred further to each amendment. (Transcript pp. 207-212.)

The interlocutory hearing having taken place before the return or appearance term of the court, the demurrers were not pressed on until after the first decision of the Supreme Court of Georgia. On December 10, 1921, the general demurrer of Town of Decatur, as amended, was sustained with certain exceptions noted in the order. (Transcript p. 207.) On the same date the demurrer of Town of Decatur to the intervention of R. C. Hackman, et. al., was sustained and the intervention stricken. (Transcript p. 217.)

The case was then submitted to the jury by the court and after the introduction of the evidence referred to in pages 26-29 of the transcript the court directed the jury to find the issues in favor of Town of Decatur, and a verdict was rendered accordingly. (Transcript p. 258.) Upon this verdict a final decree

was entered in favor of the Town of Decatur enjoining the Power Company and Electric Company as prayed. (Transcript p. 258.)

To this verdict and decree the Power Company, the Electric Company and the intervenors excepted and sued out a bill of exceptions to the Supreme Court of Georgia. (Transcript pp. 23-39.) Upon this bill of exceptions a writ of error was issued by the court. (Transcript p. 39.) The decree of the trial court was affirmed by the Supreme Court of Georgia. (Transcript pp. 14-19.) This decision of the Supreme Court of Georgia was excepted to by the Power Company and other defendants in the trial court and is now before this court for review.

The pleadings and the evidence (the only evidence before the court being the pleadings introduced and certain affidavits and admissions of defendants in the trial court—Transcript pp. 26-29) show substantially the following facts, to-wit:

That during the month of December, 1902, and prior thereto, the Electric Company owned and operated by electricity three street car lines between the City of Atlanta and Town of Decatur, one extending from near the center of Atlanta to Decatur on the south side of the Georgia Railroad, the other two running from near the center of Atlanta to Decatur on the north side of the Georgia Railroad.

That sometime prior to 1902 said street car lines were under different ownerships, but finally all three of said lines were acquired by the Electric Company;

That the most northerly of said street car lines entered said Town of Decatur on its western corporate limit and passed over various streets of said Town (Transcript p. 41) to and beyond its then eastern corporate limit, then turned north, then back west, and connected with said line again near the Court House, forming a loop in said Town of Decatur;

That many residents of said Town of Decatur to which no other street car line was convenient were served by this line;

That on December 29, 1902, said Electric Company, without notice to the Town of Decatur, commenced to tear up said most northerly street car line within the corporate limits of said town, with a view to abandoning the operation of the same;

That on the same date a restraining order was granted by the court, upon the petition of said town, preventing the removal of the tracks and other equipment of said street car line (Transcript p. 52—there seems to be some confusion in the dates, the date appearing in the transcript as December 27th, but in fact the 29th);

That soon after said restraining order was granted the Electric Company sought with said town an adjustment of the controversy without further litigation, and urged that said town permit the Electric Company to tear up said line of street railway and abandon the operation of the same, urging as a reason therefor that, if allowed to do so, said Electric Company **could** and **would** give to the citizens of the Town of Decatur better street car facilities upon another parallel line between Atlanta and Decatur running immediately north of the Georgia Railroad, then known as the Atlanta Rapid Transit Line, but owned and operated by the Electric Company; that after protracted negotiation between the Electric Company and the Mayor and Council of said town, said Mayor and Council finally consented for the Electric Company to remove said most northerly line, then known as Atlanta Railway Company line, but owned by the Electric Company, and an ordinance was passed to that effect on March 3, 1903, and accepted and agreed to by the Electric Company in a contract between said town and said Electric Company, dated April 1, 1903 (Transcript pp. 53-58), which, among other provisions, bound the Electric Company "To never charge more than five cents for one fare upon it's main Decatur line, above referred to as the Rapid Transit line, for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta, and the trip either way shall include the entire loop in the Town of Decatur, hereinafter described, though a greater fare may be charged when passengers are transported between the hours of

12 o'clock midnight and 5 o'clock A. M."; the said Rapid Transit line being then described as forming a loop in said Town of Decatur and in part passing over the same streets as said Atlanta Railway Company line; and said contract also provides that said Electric Company is within five years to double track said main Decatur line, and the franchise for this double track is granted by said town in said contract;

That upon the execution of this contract, the injunction proceedings by the Town of Decatur against the Electric Company were settled and an order passed by the court entering them settled and dismissed. (Transcript p. 58. The record is confused here. The order is printed in immediate connection with the repealing clause of the ordinance above referred to, whereas it should follow "Exhibit C.");

That said contract between the town and the Electric Company has been fully executed on the part of the town; that said Electric Company, pursuant to the provisions of said contract, did tear up, remove and abandon the operation of said Atlanta Railway Company line, to the great inconvenience of the citizens of said town living along said line and have been saved the expense of operating and maintaining said abandoned line during all these eighteen years;

That during all the time from April 1, 1903, to October 5, 1920, said Electric Company or its lessee, the Power Company, has operated said Rapid Transit line and has never sought to charge more than five cents for one fare for one passenger for one trip, but on October 5, 1920, the Electric Company and the Power Company notified the Mayor and Council of said town that on and after October 20, 1920, the fare between Atlanta and Decatur on said Rapid Transit, or main Decatur, line, would be seven cents (Transcript p. 58);

That prior to said notice the Power Company applied to the Railroad Commission of Georgia for permission to increase the fare on said main Decatur line from five to seven cents, which application was denied by the Commission on the ground that the contract of 1903 prevented them from taking jurisdiction of the matter (Transcript pp. 165, 166);

That thereafter, to-wit, on August 23, 1918, the Power Company filed a petition in the Superior Court of Fulton County, seeking by mandamus to compel the Railroad Commission of Georgia to assume jurisdiction of the question of rates on the main Decatur line, and others operated by the Power Company (Transcript pp. 76-183), which petition was answered by the Railroad Commission (Transcript pp. 184-186); that the mandamus was denied by the court (Transcript p. 182); that this ruling was excepted to by the Power Company and carried to the Supreme Court of Georgia for review (Transcript pp. 186, 187); which reversed the trial court in part, but sustained him in so far as he held that the Railroad Commission had no jurisdiction to fix rates on said main Decatur line, holding that the contract of 1903 is a valid subsisting contract (See 149 Ga., p. 1);

That said Electric Company and said Power Company seek to violate said contract of 1903 by raising the fare on said main Decatur line from five to seven cents, but do not offer to restore the status that existed when the contract of 1903 was entered into, that is, do not offer to restore the removed and abandoned street car line, although retaining all the benefits derived by saving the expense of operating and maintaining said abandoned line since 1903; and still retain possession of the franchise to double track on the streets of Decatur and still have their lines upon the streets and operate their cars over these streets under the franchise granted the Electric Company to double track by the contract of April 1, 1903.

The contentions of the Electric Company and the Power Company set up in their answer are as follows:

That neither the town, nor the Electric Company, had any right or power to enter into the contract of 1903; that they had no right to fix fares; that said parties had no right to contract for the discontinuance of the Atlanta Railway Company line; that the agreement to settle the suit restraining the Electric Company from removing and discontinuing said street car line was illegal and void and furnished no consideration for said contract; that said contract was never legal and binding, but if it was ever legal and binding, it was terminated by the notice given by the Electric Company and the Power Company to the Town of Decatur on

October 5, 1920; that said contract of 1903 is an attempt to fix fares not only in the corporate limits of Decatur, but in territory outside of said limits, and is ultra vires and void;

That since the contract of 1903 was entered into the corporate limits of Decatur have twice been extended, so as to include a considerable portion of said main Decatur line that was outside of said corporate limits in 1903; that the contract of 1903 cannot be applied to this added territory, and that to so construe the Acts of 1907, 1914 and 1916 is to impair the obligation of the contract in violation of the Constitution of the United States;

That under the provisions of the contract of 1903 the five cents fare applies only to passengers boarding cars at the terminus of the line in Atlanta or the terminus of the line in Decatur and not to passengers boarding cars at intermediate points;

That the provision in said contract of 1903 for giving a transfer "upon the payment of one full fare" means a seven cents fare as fixed by the Railroad Commission of Georgia, and not a five cents fare;

That said contract of 1903 is indefinite as to parties and is, therefore; unenforceable;

That said contract is indefinite as to the time it is to run, and is, therefore, subject to termination on notice, and that the same was terminated by said notice of October 5, 1920;

That conditions have so changed since said contract of 1903 was made, and the cost of labor and material have advanced so, that a five cents fare does not cover the cost of transporting a passenger from Atlanta to Decatur;

That said five cents rate hampers and interferes with defendants in the performance of their duties to the public and discriminates against patrons of defendants living in other communities than Decatur; in view of the fact that the Railroad Commission of Georgia has fixed a seven cents fare for passengers boarding defendants' cars outside of the Town of Decatur;

That the action of the Railroad Commission fixing fares on defendants' lines outside of the Town of Decatur at six cents, and later at seven cents, is the action of the State of Georgia and that the contract of 1903 is thereby abrogated;

That the Railroad Commission of Georgia by order required defendants to increase the quantity and quality of the service on said main Decatur line, and that to enforce said five cents fare would be to confiscate defendants' property, and that, therefore, this action of the Commission, which defendants claim is the action of the State, nullifies said contract of 1903;

That if said Act of 1907 is so construed as to deny the Railroad Commission of Georgia power to regulate fares on said main Decatur line, but at the same time give said Commission power to regulate the service on said line so as to increase its cost, said Act is unconstitutional and void; or at least that portion of it which provides: "That nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company, and provided that said Act shall not operate as a repeal of any existing municipal ordinance";

That defendants offer to surrender their franchise within the Town of Decatur, if said contract of 1903 is held valid.

The amendments to defendants' answer and cross petition only elaborate the above contentions.

R. C. Hackman and others intervened as parties defendant and alleged that to enforce the five cents fare provision of the contract of 1903 would discriminate against them, inasmuch as they live without the corporate limits of the Town of Decatur and pay seven cents for riding on the main Decatur line, and they adopt all the allegations contained in the answer and cross petition of the Electric Company and the Power Company.

## ANALYSIS OF ASSIGNMENTS OF ERROR.

An analysis of the various assignments of error shows that all fall into one of two classes, those claimed to violate article 1, Section 10 of the Constitution of the United States, and those claimed to violate the 14th amendment to the constitution of the United States.

Class 1: There are several assignments of error falling within this class, some stated affirmatively, some negatively, but they may all be concisely stated as follows:

That the decision of the Supreme Court of Georgia construing the contract between the Town of Decatur and the Georgia Railway and Electric Company; "To never charge more than five cents for one fare upon its" (plaintiffs in error's) "Main Decatur line \* \* \* for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur" violates Article 1, Section 10 of the Constitution of the United States, which provides that "No State shall \* \* \* pass \* \* \* any \* \* \* law impairing the obligation of contracts \* \* \*;" it being claimed that this provision of the Constitution is violated in the following particulars:

In that (a) having held the contract of 1903 valid, the Court should not have held that the State Railroad Commission of Georgia, under the Act of 1907, had the jurisdiction and power to increase the quality and quantity of service rendered for said five cents fare (4th assignment, page 8 of transcript of record); (b) by so construing said contract as to make the five cents fare provision applicable to passengers boarding the cars at other points than the termini in Atlanta and Decatur, plaintiffs in error claiming that the five cents fare applies only when passengers board the cars at one of the termini of said line (5th assignment, page 8 of transcript of record); (c) by applying the five cents fare provision of said contract to territory added to the Town of Decatur subsequently to the execution of said contract; (d) by not applying an alleged contract entered into between the County of DeKalb and the Georgia Railway and Electric Company to this added territory instead of the contract with the Town of Decatur and the Electric Company (6th assignment, page 9 of transcript of record).

Class 2: There are also several assignments of error in this class, some stated affirmatively, some negatively, but briefly they are as follows:

That the decision of the Supreme Court of Georgia so construes the contract of 1903 between the Town of Decatur and Georgia Railway and Electric Company as to violate the 14th Amendment of the Constitution of the United States, which provides that "no State shall \* \* \* deprive any person of \* \* \* property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" in the following particulars:

In that to require compliance with the provision of the contract, or ordinance of 1903, confiscates the property of the Electric Company and the Power Company without due process of law and denies the equal protection of the laws (a) because neither of said parties to the contract had any right, power or authority to make binding contracts as to fares; (b) because said parties are prohibited from making contracts for fixed fares, irrevocable and unlimited as to time by the Constitution of the State of Georgia set out in Sections 6389, 6464 and 6563 of the Code of Georgia, 1914 (see 1st assignment, page 5, transcript of record); (c) because the Court did not hold that, if the contract of 1903 was ever valid, it had ended prior to the pending suit (1) by complete performance, (2) by adequate notice of termination, (3) by the action of the State of Georgia, through the commission, requiring compliance with the five cents fare provision of said contract, (4) requiring the giving of the transfers on payment of said five cents fare, (5) by requiring an increase in the quality of service to be rendered over and above that provided in said contract, (6) by applying said five cents fare provision to the extended limits of the Town of Decatur (Acts of the General Assembly of Georgia, 1914, page 703 and 1916, page 681) (See 1st assignment, c to e, inclusive, page 6 of transcript of record); (d) denies to intervenors and all other patrons of the Power Co. and Electric Co. except Decatur patrons, the equal protection of the laws in that it requires them to pay seven cents for the same or less service than that for which Decatur patrons are paying five cents (see assignment 2, page 6 of the transcript of the record); (e) because the construction placed by the Supreme

Court of Georgia upon the Act of the Georgia General Assembly, 1907, page 73, as amended by the Act of 1919, page 94, denies to plaintiffs in error the equal protection of the laws and fixes a discriminatory and illegal scheme of rates by authorizing and empowering the Railroad Commission of Georgia to change rates of fare fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907 (see assignment 3 (a), page 7 of the transcript of record); (f) in that said Act of 1907, as construed by the Court, denies to the Railroad Commission of Georgia the right, power and authority to change the five cents fare provision of the contract of 1903, but confers jurisdiction on said Commission to increase the quality and quantity of service to be rendered and to require the issuing of transfers upon the payment of said five cents fare (see assignment 3 (b) page 7 of transcript of record); (g) in that the Act of 1907, as construed by the Court, as against the individual intervenors, fixes an illegal and discriminatory scheme of rates by authorizing the Railroad Commission of Georgia to fix a seven cents rate of fare for less or similar service rendered to intervenors while maintaining in force a five cents rate to Decatur patrons for a greater or similar service (see assignment 5, page 8 of transcript of record); (h) in that the contract of 1903, as construed by the Court denies to the Power Company and the Electric Company the right to terminate and cease to operate all of its lines in the Town of Decatur and compels said companies to operate said lines without compensation and confiscates their property (see assignment 7, page 9 of transcript of record).

## LAW BRIEF.

## I.

THIS COURT IS WITHOUT JURISDICTION IN THIS CASE THE SUPREME COURT OF GEORGIA HAVING RENDERED THE DECISION COMPLAINED OF UPON AN INDEPENDENT NON-FEDERAL QUESTION, BROAD ENOUGH TO MAINTAIN THE JUDGMENT.

This case was first taken to the Supreme Court of Georgia from the granting by the trial court of an interlocutory injunction, and affirmed.

**Ga. Ry. & Power Co., et al. vs. Decatur, 152 Ga. 143 (Transcript pages 19 to 23.)**

In that decision the Supreme Court of Georgia adhered to its ruling in the mandamus case 149 Ga. 1, holding the contract of 1903 in controversy to be a valid subsisting contract but affirmed the case upon the independent non-Federal ground that the injunction was properly granted because the Georgia Railway & Power Co. was without authority to fix the rate which the Town of Decatur sought to have enjoined, saying:

"But the Court is further of the opinion that, independently of the ruling made in the case referred to (149 Ga. 1), the Georgia Railway & Power Co. was without authority to fix the rate which the plaintiffs in the court below sought to have enjoined, and that consequently the court did not err in granting the interlocutory injunction." (Transcript page 19.)

The trial court after this ruling sustained the general demurs of the Town of Decatur, to answer and cross bill and amendments thereto of plaintiffs in error and struck them (Transcript pages 207 and 217), directed a verdict and entered the decree making the injunction permanent. (Transcript pages 258 and 29). The plaintiffs in error again carried the case to the Supreme Court of Georgia from this last ruling (Transcript page 23 and the decision thereon by the Supreme Court of Georgia is the one now complained of as being in conflict with Art. I. Section

10 and the 14th amendment of the Constitution of the U. S.  
(Transcript pages 5 to 10.)

This last decision by the Supreme Court of Georgia is found in 153 Ga. 329, Transcript page 15. It adopts the rulings in the former decision (152 Ga. 143, Transcript page 19) as the law of the case, reciting the ruling upon the independent non-Federal ground above quoted, and saying that the ruling in the 152 Ga. 143 is not only res-adjudicata of every issue involved in the present hearing but is the "law of the case" in the case now under review.

So that by adoption of the rulings in the first decision, the decision complained of is based upon the independent non-Federal question above stated. This independent ruling is based upon the want of authority in the Power Co. to fix fares under the Constitution and statutes of Ga. See the discussion of this question by the Supreme Court of Ga. 152 Ga. 146, Transcript page 21. And we think that this independent ruling is so manifestly a non-Federal question that we will not further discuss it in this brief. It is equally apparent that the independent ruling above referred to is broad enough to maintain the judgment, that is to authorize the grant of the injunction restraining the Company from charging the 7 cents fare which the Company had arbitrarily fixed.

This Court, therefore, has no jurisdiction in this case under the repeated rulings of this Court, the general rule on this subject being stated as follows:

"In order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, that it was actually decided, or that the judgment as rendered could not have been given without deciding it, and where the decision complained of rests on independent grounds not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented."

See note, page 733, to Section 237 of the Judicial Code, 5 Federal statutes annotated, and authorities there cited. See also:

**Eustis et al. vs. Bolles et al.** 150 U. S. 361, 37 L. Ed. 1111 and cases cited.

**The California Powder Works vs. Davis,** 151 U. S. 389, 38 L. Ed. 206.

**Howat et al. vs. Kansas,** advance sheets 66 U. S. (L. Ed.) 322,324.

The writ of error in this case must therefore be dismissed for want of jurisdiction.

## II.

THE DECISION RENDERED BY THE SUPREME COURT OF GEORGIA ON THE GRANT OF AN INTERLOCUTORY INJUNCTION IN THIS CASE (152 Ga. 143: TRANSCRIPT PAGE 19) WAS A FINAL ADJUDICATION OF THE CASE UNDER THE DECISIONS OF THE GEORGIA SUPREME COURT FROM WHICH PLAINTIFFS IN ERROR COULD HAVE SUED OUT A WRIT OF ERROR TO THE SUPREME COURT OF THE U. S., BUT DID NOT. NOT HAVING EXCEPTED TO THAT DECISION OF THE GA. SUPREME COURT, THEY ARE CONCLUDED BY IT AND THE DECISION COMPLAINED OF IN THIS CASE SHOULD BE AFFIRMED.

"A judgment of a trial court granting or refusing an injunction, when the same depends entirely upon a question of law, is, upon its affirmance by the Supreme Court, a final adjudication of such question."

**Ingram vs. Mercer University** 102 Ga. 226, 228.

**Ga. Ry. & Power Co. vs. Decatur** 153 Ga. 329. (Transcript page 15) and cases cited. See the discussion of this question by the Supreme Court of Ga. (Transcript pages 16, 17 and 18.)

The former decision (152 Ga. 143) disposed of the whole case on the merits and left nothing to the judicial discretion of the trial court.

"A judgment of a trial court granting or refusing an injunction, where the same depends upon a question of law, is, upon its affirmance by the Supreme Court a final adjudication of such question."

"The rulings of the Supreme Court, upon the interlocutory order of the trial judge granting an injunction becomes the law of the case as to the particular case." (153 Ga. 329, Transcript page 15.)

The Supreme Court of Georgia in the decision now complained of said that its former decision was the law of the case.

"A decision of the highest State court, which, on a second appeal, affirmed the judgment below on the ground that its former decision was the law of the case, is not reviewable in the Federal Supreme Court, where the Federal question relied upon to confer jurisdiction was involved in the first decision, and that decision was final, in the sense of the judicial Code § 237, governing writs of error to the Supreme Court."

**Rio Grande Western Railway Co. vs. Stringham et al. 239 U. S. 44, 60 U. S. (L. Ed.) 136.**

In view of the fact that there is very little evidence in this case outside of the facts stated in the pleadings of plaintiff, which were read as evidence, the other evidence consisting of a few affidavits and admissions of counsel for parties, and in view of the further fact that the defensive pleadings were practically all stricken on demurrer, we presume that the Court will decide this case chiefly by a consideration of the pleadings, and will decide whether or not the allegations of fact contained in the defensive pleadings stricken by the trial court could authorize the relief sought by the plaintiffs in error under the two sections of the United States Constitution referred to in their various assignments of error. We, therefore, deem it unnecessary to discuss the demurrers separately from the merits of the case and will consider them together.

## III.

It seems to us that the first question to be determined is the question was there, or was there not, a contract? Was the contract of 1903 (transcript pp. 53-58) valid and binding on the parties, or was it void *ab initio*? In determining this question, we apprehend that this court will give great weight to the decisions of the Supreme Court of Georgia, and follow those decisions unless they are clearly in conflict with the Constitution of the United States.

In *Yazoo & Miss. Valley R. R. Co. vs. Wirt Adams*, 181 U. S., 580, 45 L. Ed., 1011, this Court says:

"A construction of statutes adopted by the court of last resort in that state will be adopted by the Supreme Court of the United States, even in a case where that court may exercise an independent judgment, if there is any reasonable doubt on the question."

See also:

**Board of Liquidation of the City Debt vs. State of Louisiana on the relation of Lucretia B. Wilder, et al.**, 179 U. S., 622 (2), 45 L. Ed., 347 (2);

**Burgess vs. Seligman**, 107 U. S., 20 (8), 27 L. Ed., 359 (8);

**Freeport Water Co. vs. Freeport**, 180 U. S., 595, 596, 45 L. Ed., 687.

## IV.

**CONTRACT OF 1903 FIXING A MAXIMUM RATE OF FIVE CENTS IS VALID AND BINDING ON DEFENDANT COMPANIES UNTIL THE LEGISLATURE SEES FIT TO EXERCISE ITS PARAMOUNT AUTHORITY TO REGULATE SUCH RATES.**

(a) The identical contract involved in this case (Transcript pp. 53-58) has been before the Supreme Court of Georgia three times, and has each time been upheld by that Court as a valid subsisting contract. First, it was passed on in the case of Geor-

gia Railway and Power Company vs. Railroad Commission of Georgia, 149 Ga., page 1. The Power Company had previously filed a petition to the Railroad Commission of Georgia, praying to be allowed to increase its rate of fare in the City of Atlanta and the suburban towns of Decatur, East Point and College Park. The Railroad Commission held that under the Act of 1907 of the Georgia Legislature, Acts of 1907, page 72, it was without jurisdiction to consider the petition in view of certain contracts existing between the Power Company, or its lessor, the Electric Company, and the cities named at the time of the passage of the Act of 1907, which contracts still subsisted at the time said petition was filed; section five of the Act of 1907, providing: "That nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company, and provided that this Act shall not operate as a repeal of any existing municipal ordinance \* \* \*"; the Act, among other provisions, extending the jurisdiction of the Railroad Commission, so as to include street railroads and street railroad corporations. The Power Company then filed a mandamus proceeding in the Superior Court of Fulton County to compel the Railroad Commission to take jurisdiction of its petition. The mandamus was denied, and the decision of the Supreme Court of Georgia above cited reviewed the judgment in this mandamus case, which is set out in full as "Exhibit J" to the amendment to the petition of Town of Decatur (Transcript pp. 76-189). The Supreme Court of Georgia, in passing on the Atlanta and East Point ordinances, page 9, says: "We have gone carefully through these ordinances conferring certain rights and franchises upon the street railroad companies mentioned, have considered the terms of what might be called the consent contract in the consolidating ordinance, and we cannot find that there were the elements of a contract existing in view of the provisions of the consolidating ordinance." But in passing on the Decatur contract the Court makes a distinction, and on page 11, says: "The contracts with the municipalities of College Park and Decatur stand upon a different footing. Those contracts were in existence on the 23rd day of August, 1907, and are still subsisting contracts". (Italics ours.) The Supreme Court next passed on this contract in the case of Georgia Railway and Power Company et al. vs. Town of Decatur, 152 Ga., page 143 (see also Transcript pp. 19-23). In this case the Power Company requested

that the decision in 149 Ga., page 1, be reviewed and overruled, but the court adhered to its former ruling and upheld the contract again. The Court again passed on this contract in the case of Georgia Railway and Power, et al. vs. Town of Decatur, 153 Ga., page 329, and again upheld it, the decision in this last case being the one now under review by this Court and appearing on pages 15-19 of the transcript.

The terms of the contract in question were embodied in an ordinance passed by the Mayor and Council of the Town of Decatur, March 3, 1903 (erroneously stated in the transcript as 1904), which ordinance was made a part of a solemn contract entered into between the Electric Company, the lessor of the Power Company, and the Mayor and Council of the Town of Decatur, April 1, 1903. (Transcript pp. 53-58.)

By the terms of this contract, the Town of Decatur granted to the Electric Company a franchise to construct its double track upon the streets of the Town of Decatur, and also gave its permission to the Electric Company to take up and abandon the said Atlanta Railway Company line *upon condition that the Electric Company should never charge more than five cents for one fare upon its main Decatur line*, referred to as the Rapid Transit line, for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta, and that the trip either way should include the entire loop in the Town of Decatur, above described, though a greater fare might be charged when passengers were transported between the hours of 12:00 o'clock midnight and 5:00 o'clock A. M., and that said Georgia Railway & Electric Company should grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur upon said Rapid Transit line to any point within the City of Atlanta on any of its lines in said city, and vice versa, which should not result, however, in carrying the passenger on a parallel line or in the same general direction from which he came, provided such transfer was requested at the time of the payment of the fare and provided that the passenger should abide by such reasonable rules and regulations as the Company might make.

The contract provided that

*In consideration of the benefit to said party of the second part from discontinuance, abandonment and removal of the said line of railway hereinbefore referred to, and in further consideration of the benefits to be derived by it from the performance on the part of the Town of Decatur of the provisions undertaken to be performed by it under said ordinance, said party of the second part hereby contracts and agrees with the said Town of Decatur that it (the said Georgia Railway & Electric Company) will, upon its part, do and perform all things specified in said ordinance to be done and performed by it, and will keep and observe the conditions and terms of the said ordinance."*

One of the benefits derived by the Electric Company from the Town of Decatur was the granting of the franchise as specified in the contract to construct its double track upon the streets of Decatur.

That the franchises, benefits and privileges granted to the Electric Company were *granted only upon condition* that the wit: To never charge more than five cents for one fare upon its main Decatur line, etc., and to grant one transfer ticket upon the payment of one full fare, etc.

Such contracts have been repeatedly upheld by this Court and the courts of last resort in the various States, and this contract is valid and binding both upon the Town of Decatur and the Electric Company and the Power Company until the Legislature of Georgia sees fit to exercise its paramount authority to regulate such rates. See the following authorities:

**Duluth St. Ry. Co. vs. Railroad Commission of Wisconsin,  
161 Wis. 245, 152 N. W. 887;**

**Boerth vs. Detroit City Gas Company, 152 Mich. 654, 116  
N. W. 628;**

**Benwood vs. Public Service Commission, 75 W. Va. 127,  
83 S. E. 295;**

**Muncie Natural Gas Co. vs. City of Muncie, 160 Ind. 97,  
60 L. R. A. 822;**

**Mercantile Trust Co., et al. vs. Collins Park, et al.**, 101 Fed. 347;

**City of Sedalia vs. Public Service Commission of Mo.**, 204 S. W. 497;

**People vs. O'Brien**, 18 N. E. 692 (N. Y.);

**Quinby et al. vs. Public Service Commission**, 119 N. E. 433 (N. Y.);

**Public Service Commission et al. vs. Westchester St. Ry. Co.**, 99 N. E. 536 (N. Y.);

**Niagara Falls vs. Public Service Commission**, 128 N. E. 247 (Affirms Quinby case).

**City of New York vs. Nixon et al.**, 179 N. Y. Sup. 82;

**City of Manitowoc vs. Manitowoc & N. Traction Co.**, 145 Wis. 13, 129 N. W. 925. This contract fixed the rate of fare between certain cities;

**City of Superior vs. Douglas County Telephone Co.**, 141 Wis. 363, 122 N. W. 1023;

**Village of Warsaw vs. Gas Co.**, 182 N. Y. Sup. 73;

**State vs. Home Tel. Co.**, 172 Pac. 899;

**Carlisle Ry. Co. et al.**, 91 Alt. 960 (2);

**International Co. vs. Rand**, 171 N. Y. Sup. 193 (3) 197;

**N. Y. Co. vs. Subway Co.**, 235 U. S. 179;

**Columbus Co. vs. City of Columbus, Ohio**, 6 A. L. R. 1648 (note p. 1659), 249 U. S. 399;

**Weatherbee et al. vs. Denham Ry. Co.**, 95 N. E. 81. Fixed fares of 3 towns;

**People vs. Suburban Co.**, 49 L. R. A. 650 (1) (2) (3).

"Power conferred upon a Public Service Commission to regulate rates fixed by statute does not include power to regulate those fixed by contract between a municipal corporation and a street railway occupying its streets, as embodied

in the railway company's franchise, which, under the Constitution, can be granted only on consent of the local authorities."

**Quinby vs. Public Service Commission, 223 N. Y. 244, 119 N. E. 433, 3 A. L. R. 685.**

1. "Statutes of Ohio creating Public Utilities Commission do not confer authority on the Commission to change rates fixed by the terms of valid contract, made by a public utility with a municipality, in the exercise of powers clearly conferred upon it.

2. "When the terms of a valid ordinance granting a franchise to a street or interurban railway company are accepted by the grantee, such action constitutes a contract between the parties. As long as the Company retains its franchise and operates its road thereunder, its terms must control."

**Interurban Railway, etc. vs. Public Utilities Commission, 98 Ohio St. 287, 120 N. E. 831, 3 A. L. R. 696.**

**Guilford Water Co., 108 At. 446;**

**Searsport Water Co., 108 At. 452;**

**Warsaw vs. Pavilion Natural Gas Co., 187 N. Y., Sup. 350;**

**Muskegon Etc. Co. vs. Grand Rapids Co., P. U. R. 1921, C, 583.**

**Chicago Ry. Co. vs. Chicago, 126 N. E. 585.**

As to (2) above see

**City of Cincinnati vs. Public Utilities Commission, 98 Ohio St. 320, 121 N. E. 688, 3 A. L. R. 705 (1) and (9);**

**10 Corpus Juris 673 (11);**

**12 Corpus Juris 1015 (Notes 95 and 96);**

**Alleghany vs. Millville, 28 Atl. 202;**

**Almand vs. Railway Co., 108 Ga. 417;**

**City Council of Augusta vs. Railway Co., 150 Ga., 529;**

**25 R. C. L. (note 7), Shreveport Traction Co. vs. Shreveport, 47 So. 40, 129 A. S. R. 345;**

**P. U. R. 1916 E. 525; P. U. R. 1920 E. 536;**

**Board of Education vs. Public Serv. R'y. Co.**

**P. U. R. 1918 A. 577;**

**City of Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517, 48 L. Ed., 1102.**

In this case the city sought to reduce the fare after the contract was made, and this Court held that the action of the city impaired the obligation of the contract, and that it must stand as made. If the city cannot abrogate the contract, neither can the company.

(b) Under the Constitution of Georgia, 1877, Article 3, Section 6, Paragraph 20 (Code of 1910, Sec. 6448), no street passenger railway can be constructed within the limits of any incorporated town or city without the consent of the corporate authorities, and under Section 2600, Code of Georgia, 1910 (Parks Ann. Code, 1914), providing for the incorporation of street railroads, it is provided that no street railroad so incorporated "shall be constructed within the corporate limits of any incorporated town or city without the consent of the corporate authorities; and provided further, that all such street railroad companies incorporated under this division shall be subject to all just and reasonable rules and regulations by the corporate authorities, and liable for all assessments and other lawful burdens that may be imposed upon them from time to time."

The Electric Company was incorporated under this law (Transcript, pp. 121-124), and, therefore, under the constitutional provision above referred to and the section of the code quoted, is bound by the terms, conditions and restrictions contained in the grant of its franchise to construct its railroad in the Town of Decatur. The contract of 1903 grants a franchise to double-track the main Decatur line of street railway and imposes restrictions, one of which is the limitation of fares to not more than five cents. This franchise was accepted, and thus became binding on the town and the Electric Company.

"Where the right of a municipality to refuse its consent to the operation of a street railway in its streets is an absolute one, its power, in the first instance, to impose conditions is unlimited."

25 R. C. L. 1143 (30);

**Mercantile Trust & Deposit Co. vs. Collins Park & Belt R. R. Co., 101 Fed. 347, construing this provision of the Georgia Constitution;**

**Chicago General Railway Company vs. City of Chicago, 176 Ill., 253, 66 L. R. A., 959,** holding that "a street railway company is not denied the equal protection of the laws, or due process of law, by giving it the privilege of using the streets only on conditions different from those which have been imposed on other companies."

**City of Detroit vs. Fort Wayne & Belle Isle R. Co., 20 L. R. A., 79;**

**The Richmond, Fredericksburg & Potomac Railroad Company vs. City of Richmond, 96 U. S., 521, 24 L. Ed., 734;**

**Oklahoma City vs. Oklahoma Railroad Company, 16 L. R. A. (N. S.), 651, and note.**

In discussing the power of the municipality to make the contract under review, the Supreme Court of Georgia in the mandamus case above cited, 149 Ga., 5, say:

"We readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street railways, as well as upon steam railways, is a matter falling within the police power, and that neither the Legislature of the State nor the legislative body of any municipality can, by ordinance or contracts, abridge the exercise of the police power of the State, but we do not think that in all cases and in reference to every subject which might fall within the police power of the State, it is incompetent for a municipality or other corporation to make a contract in reference to a subject matter when the State has not seen fit to exercise the police power in reference thereto."

Then referring to the constitutional provision above quoted, the Court says:

"Under the Constitution of this State, Art. 3, Sec. 7, Par. 20 (Civil Code, Sec. 6448), the General Assembly cannot authorize the construction of any street passenger railway within the limits of an incorporated town or city without the consent of the corporate authorities. Under such provisions the city authorities may withhold their consent for the construction of a street railroad upon any of the streets of the municipality. It would seem that if they can do this they might impose conditions upon which a railroad company might construct its tracks in the streets, and enter into a contract with the corporation as to the conditions upon which it should be permitted to construct a railway within the limits of the municipality."

The Court says further, on page 7:

"We do not base our opinion that a street railroad company and a municipality may, under certain circumstances, contract with reference to rates of fare entirely upon that part of the Constitution which provides that the Legislature shall not authorize a street railroad company to construct its railways in the limits of a municipality without the consent of the municipal authorities. We think that where the State has not exercised its police power and is not seeking to exercise its police power over the subject of fares upon street railroads, the municipality and the street railway may enter into contracts on this subject that will be valid; but the right of the municipality to refuse absolutely its consent to the construction of a street railway within its limits, and the constitutional and statutory provisions in regard thereto strengthen us in the view that it is competent for the municipality and the street railroad company to enter into contracts upon this subject."

And it is said by the Supreme Court of Georgia in *Atlanta Ry. & Power Co. vs. Atlanta Rapid Transit Co.*, 113 Ga., 484, that:

"Our constitution in paragraph 20 of Section 7, Article 3, declares that the General Assembly shall not authorize the construction of any street passenger railroad within the

limits of any incorporated town or city without the consent of the corporate authorities. But when a corporation to duly construct such a railway has been created, and the right to do so conferred, it is within the power of the corporate authorities of the city, in whose streets it is proposed to be constructed, to refuse its admission altogether, as well as to confine it to certain streets and routes, and to impose, as a condition precedent to such construction, such reasonable terms as the corporate authorities, looking to the interest of the citizens, may deem best."

See also:

**Milwaukee Ry. Co. vs. R. R. Com., 153 Wis., 592, L. R. A. 1915 F., 744, affirmed in Milwaukee Ry. Co. vs. R. R. Com., 238 U. S., 174, 59 L. Ed., 1254.**

In this case a rate agreed upon between the city and the railway company was modified by the State through the action of the R. R. Commission, but in upholding the action of the Commission, the Court said the contract was good between the parties until the State saw fit to exercise its paramount authority.

In the case of Manitowoc vs. Manitowoc & N. Traction Co., 145 Wis. 13, 140 Am. St. R., 1056, which is cited and followed by this Court in the Milwaukee case, *supra*, the Court says:

"When a city, with authority to refuse its consent to the use of its streets by interurban cars, grants to the railway company the right to run cars in its streets on the condition that the Company shall carry passengers between that city and another city at a specified rate, the agreement is binding between the parties; but if no specific authority has been conferred upon the city to make such an agreement the State may interfere whenever public weal demands. Yet until the State sees fit to exercise its paramount authority to modify the rates (which in this case it has not done), the contract is in force between the parties."

The foregoing authorities dispose of the assignment of error that the Town of Decatur had no power to make the contract in question.

**CONTRACT OF 1903 MUST STAND AS LONG AS DEFENDANT COMPANIES RETAIN POSSESSION OF AND ENJOY THE VALUABLE FRANCHISES, RIGHTS AND PRIVILEGES WHICH THEY OBTAINED BY THIS CONTRACT. THE GENERAL ASSEMBLY MAY TERMINATE THE CONTRACT AS TO RATES, BUT NOT THE DEFENDANTS.**

(a) The defendant companies claim (See Sections 29, 37, 38 and 39 of cross bill, Transcript pages 223, 228) that the contract being indefinite, fixing no period of time when it is to end, they may revoke it on notice.

Such is not the law in reference to this contract and under the circumstances in this case as shown by the facts.

The facts show that the Electric Company was permitted to take up this Atlanta Railway Company line, and that in pursuance of this contract, it did take up this Atlanta Railway Company line, and that the franchise was granted to the electric company to lay its double track in the streets of the Town of Decatur, upon condition never to charge more than five cents and to grant transfers as provided in said contract, and that the Power Company as lessee of the Electric Company is now in possession of franchises, rights and privileges granted under and by virtue of this contract, and now enjoys those valuable franchises, rights and privileges. It appears that this Atlanta Railway Company line was a line which was practically parallel with said main or North Decatur line, extending from Decatur to Atlanta. Said defendant companies have been saved the expense of maintenance and operation of this line for 18 years. It is not proposed to restore this line, and, as a matter of fact, it would be impossible for defendant companies to restore this line which extended from Atlanta to the Town of Decatur. By the taking up of this third line, defendant companies deprived the Town of Decatur and its citizens of this additional line extending from Decatur to Atlanta. They have during this period of 18 years been saved the cost of maintenance and operation of this line. This saving has inured to the benefit of defendant companies and doubtless saved them hundreds of thousands of dollars, which has gone to increase their dividends.

It is not insisted that there is anything in the contract itself which gives defendant companies the power to revoke the contract.

We insist that the contract must stand until the Legislature chooses to take jurisdiction and to terminate the contract. We insist that as long as defendant companies are in possession of and enjoy the franchises, rights and privileges which they have obtained under this contract, they must abide by it.

The following authorities are cited to sustain the proposition above stated:

"Every contract is *prima facie* permanent and irrevocable, and it lies on a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and irrevocable, but was to be in some way or other subject to determination.

"Contracts fixing no period of duration—Where a contract is not for personal services, or does not require the imposing of special confidence, and does not fix a limit of its duration, it cannot be regarded as terminable except by mutual consent. So where a contract is not revocable at the will of either party or otherwise limited as to its duration by its express terms, or by the inherent nature of the contract itself, it is presumably intended to be permanent and perpetual in the obligation it imposes."

**13 Corpus Juris 604.**

"A contract between the owner of a tract of coal land and a railroad company, by which the landowner agreed to develop mines on his land to a stated capacity, and the company agreed to build a branch line to the mines, and to purchase the coal produced at the ruling price of a certain other coal, which contained no provision as to its duration, was not terminable at the will of one party, but was permanent so long as the stipulated production was maintained, unless sooner terminated by consent of both parties."

**McKell vs. Chesapeake & O. Ry. Co., 175 Fed. 321, 20 Ann. Cases 1097, 1102. (See note page 1104.)**

See also the following cases cited by McKell case, *supra*:

Page 330—

**Great Northern Ry. Co. vs. Manchester, Sheffield, etc., Ry Co., 5 De Gex & Sm. 138;**

**Llanery Ry. & Dock Co. vs. London & N. W. Ry. Co., L. R. 8 Ch. App. 942;**

**Franklin Tel. Co. vs. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776;**

**Robson vs. Mississippi Logging Co. (C. C., 43 Fed. 364, affirmed 69 Fed. 773, 16 C. C. A. 400;**

**Western Union Tel. Co. vs. Pennsylvania Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968.**

Page 332—

**Stonega Coal Co. vs. L. & N. R. R. 106 Va. 23, 55 S. E. 551, 9 L. R. A. (N. S.) 1184.**

“The defendant has obtained and is now in possession of valuable public rights, and so long as it holds them it must fulfill its obligation.” (Page 551.)

**Public Service Commission, Second Dist., vs. International Railway Co., 172 N. Y. Supp. 551.**

1. “A grant by a municipality to a gas corporation for the use of the streets, when accepted, becomes a contract, not a mere privilege or gratuity.”

2. “The regulation of rates for gas in the franchise of the company is an exercise of the police power through a municipality as a political subdivision of the State, and the State can thereafter modify the rates without impairing the obligation of a contract, since no contract can defeat legitimate governmental authority.”

3. “A company cannot increase the rates of charges for gas as fixed by its franchise by filing a new schedule of

rates with the Public Service Commission, but can charge such increased rates only after the State has exercised its police power to change the franchise in that respect."

(Page 75.) "When and by whom shall this police power be exercised to modify an existing franchise rate? The evident answer is only by the State through its regularly constituted authorities. It would seem most illogical that a party to such franchise contract, desiring to avoid its obligation, might on its own motion, and without the consent of State authority, repudiate its obligation under the franchise, and undertake to exercise the police power alone vested in the State. But that in effect is just what the defendant in this case has undertaken to do. It is true it has petitioned the Public Service Commission for leave to increase its rates for gas furnished consumers, and that proceeding is now pending before that body; but until a final decision in that proceeding is rendered, and for the time being, the defendant proposes to charge consumers the increased rate specified in its amended tariff schedule. In other words, it proposes to be a law unto itself for the time being, and until the Public Service Commission finally acts. We do not think that position can be sustained upon principle, and that until the Public Service Commission decides that the defendant is entitled to a higher rate for gas it is bound by the franchise rates agreed on in the grants given by the village plaintiffs. It is for the State to determine whether a modification of the franchise rate shall be made, and not for the defendant."

Page (76.) "We think the plaintiffs have established the right to the injunction asked. Our decision is based on the theory that the terms of franchises such as the defendant enjoys in the villages of Perry and Warsaw cannot be disregarded by the defendant until the franchises are modified by the State, acting through its Public Service Commission, under the police powers reserved to the State."

**Village of Warsaw et al. vs. Pavilion Natural Gas Co.**

**Village of Perry et al. vs. Same. 183 N. Y. Supp. 73.**

(Page 981.) "I start with this proposition, that *prima facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination. No doubt there are a great many contracts of that kind: A contract of partnership, a contract of master and servant, a contract of principal and agent, a contract of employer and employed in various modes, all of these are instances of contracts in which, from the nature of the case, we are obliged to consider that they were intended to be determinable. All the contracts, however, in which this has been held are, as far as I know, contracts which involve more or less of trust and confidence, more or less of delegation of authority, more or less of the necessity of being mutually satisfied with each other's conduct, more or less of personal relations between the parties. But I am of opinion that no such consideration applies to a case in which there is a grant or an agreement in the nature of a grant, of a way leave, or of running powers, which is only another mode, according to my view of it, of expressing a way leave."

**Western Union Telegraph Co. vs. Pennsylvania Co., 129 Fed 849, 68 L. R. A. 968.**

"The city being a creature of the State, may contract for a supply of water for an unlimited period, in the absence of constitutional provisions forbidding such a contract."

(Page 741.) "We are not called upon to consider now whether the State has reserved authority to regulate and control the terms and conditions of service. The State has not yet undertaken to do it, in this case. The State so far has said only that the parties might contract on such terms as they might agree upon. And so far as the contract was within the authority given by the charter, it must be held to be valid. The legislature placed no limit upon the length of time for which they might contract, and therefore we cannot. Whether the legislation was wise or unwise was

a question of public policy. It was a question for the legislature. And a legislative determination of public policy, within constitutional limitations, is conclusive upon the courts. Cities, as well as corporations, are creatures of the State. And we know of no constitutional provision which forbids a contract between city and company for a supply of water for an unlimited period."

**City of Belfast vs. Belfast Water Co., 115 Me. 234, 98 Atl. 738.**

See also

**Atlantic City Waterworks Co. vs. Atlantic City, 48 N. J. 378, 6 Atl. 24.**

"An ordinance passed by a village council, granting a franchise to an interurban railway company to construct its line through the village, contained the following provision: 'Should the Village of Pleasant Ridge be annexed to the City of Cincinnati, the rate of fare charged for a ride in either direction between one point in said village and the Cincinnati terminus shall not exceed five cents.' The company thereafter duly accepted the franchise and constructed, maintained and operated its line thereunder. Subsequently the village was annexed to the city. Held, the acceptance of the grant by the company constituted a binding contract between the parties. As long as the company retains the franchise and operates its road thereunder, its terms must control."

(Page 190.) "But in this case we are dealing with the subject of contract. It implies a meeting of minds."

"But we are not able to see how the court can alter the terms of the contract in this case as the parties made it. The only thing the court can do is to enforce the contract as it finds it, and to hold that as long as the company continues to operate the franchise it must submit to the terms thereof."

The street railway company contended the village was wholly without authority to prescribe or contract for fares beyond the municipal limits, etc.

**Interurban Ry. & Terminal Co. et al. vs. City of Cincinnati, 93 Ohio St. 108, 112 N. E. 186.**

**State vs. Home Telephone Co., 172 Pac. 899 (2).**

In the case of **Franklin Telegraph Company vs. Harrison, 145 U. S. 459, 36 L. Ed. 776**, the court, referring to the contract between the telegraph company and Harrison Bros., in which no limitation was expressed, on page 780, first column, L. Ed., says: "*They simply purchased the use without limitation as to time, after the ten years, for themselves and licensees, of a wire erected on the poles of the telegraph company, between Philadelphia and New York.*" (Italics ours.)

(b) There is a line of decisions holding that a grant by a city to a street railway company of a franchise to use the streets of the city for railway purposes, without fixing a time limit, is against public policy and void; but the New York court and the courts of last resort of some other States hold that such a grant creates a property right, and is perpetual, unless a time limit is fixed in the grant. This court has adopted the latter rule. The leading New York case is **People vs. O'Brien, Receiver, 2 L. R. A. 255.** For Federal cases see:

**City of Owensboro vs. Cumberland Telephone & Tel. Co., 230 U. S. 38, 57 L. Ed. 1389;**

**City of Covington vs. South Covington & Cincinnati Ry. Co., 246 U. S. 413, 62 L. Ed. 802, 2 A. L. R. 1099;**

and see elaborate rule on p. 1122, stating the rule in Federal courts and collecting the authorities;

**Northern Ohio Traction & Light Company et al. vs. State of Ohio, 245 U. S. 574, 62 L. Ed. 481;**

**City of Louisville vs. Cumberland Telephone & Telegraph Company, 224 U. S. 649, 56 L. Ed. 934;**

**Old Colony Trust Co. vs. City of Omaha, 230 U. S. 100, 57 L. Ed. 1410;**

**Grand Trunk & W. R'y Co. vs. City of South Bend, 227 U. S. 544 (3 & 4), 57 L. Ed. 633 (3 & 4).**

If, then, the grant of a franchise to use the streets of a city for railway purposes vests in a public service corporation a perpetual property right, when no time limitation is expressed in the granting ordinance, which is protected by the Federal Constitution, it would seem that the public service company would be bound by all the terms, stipulations and conditions imposed upon it in the granting ordinance, as a consideration for making the grant, as in the case at bar, the provision to "never charge more than five cents for one fare," etc., especially when the terms of the ordinance have been reduced to a contract and signed by both the public service company and municipality, as in the case at bar, and we submit that the authorities already cited fully support this proposition. Under these authorities, the Town of Decatur cannot revoke the right of the Electric Company to use the streets covered by the grant, nor can the Electric Company raise the rate of fare on the main Decatur line, for the provision that the Electric Company shall "never charge more than five cents," etc., is a condition annexed to the grant and became a part of the contract entered into under the constitutional provision requiring the permission of the city before a street car line can be built within the corporate limits. But certain parts of this contract deal with subjects within the police powers of the State, and, while such parts cannot be altered by the immediate parties to the contract, they are always subject to the regulatory control of the legislature, which has plenary power over all matters pertaining to the police power. Art. 4, Sec. 2, Par. 2, Constitution of Georgia, Park's Code 1914, Section 6464, which provides that "the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State."

This court has frequently recognized the distinction between the two classes of provisions in contracts of the kind here involved, one dealing with strictly property rights, the other with regulatory subjects under the police power. (Grand Trunk W. R. Co. vs. South Bend, 227 U. S. 553, 57 L. Ed. 639, and cases cited.) The Supreme Court of Georgia in the case of Geo. R'y & Power Co. vs. R. R. Com. of Ga., 149, p. 5, in passing on this identical contract recognizes this distinction when it says: "We

readily assent to the proposition that the regulation of passenger tariffs, the fixing of fares upon street railways, as well as upon steam railways, is a matter falling within the police power, and that neither the legislature of the State nor the legislative body of any municipality can, by ordinances or contracts, abridge the exercise of the police power of the State; but we do not think that in all cases and in reference to every subject which might fall within the police power of the State it is incompetent for a municipality or other corporation to make a contract in reference to such subject matter when the State has not seen fit to exercise the police power in reference thereto." It will thus be seen that the construction placed upon this contract upholds it as between the Electric Company and the Town of Decatur, protects the property right of the Electric Company as to the use of the streets and protects the public by enforcing the provision as to fares, until such time as the legislature thinks the rate of fare should be changed, when it will call into play the police power of the State and modify the fare, either by raising it or reducing it, as the public interest and fair dealing with the Electric Company may require. This construction of the Supreme Court of Georgia applying the constitutional provision of Georgia in reference to the public power to the contract under review is similar to the repeated rulings of this court that the States may legislate upon subjects dealing with interstate commerce when Congress has not acted upon the same subjects, but that the instant Congress exercises its dormant power on such subjects any State legislation thereon is superceded. So the contract between the Electric Company and the Town of Decatur as to rates is binding on both parties until the State exercises its dormant police power. We submit that this construction by the Supreme Court of Georgia of the contract under review prevents any possible conflict with the Federal Constitution by retaining in the legislature full control of the provision in reference to fares, so that it may be modified whenever the public interest or justice to the Electric Company may require it. If we are correct in this position, then the decision of the Supreme Court of Georgia is controlling on the question. See *Old Colony Trust Co. vs. City of Omaha*, 230 U. S. 100, 57 L. Ed. 1410, where it is said: "Decisions of the State courts relating to matters of local law, such as the construction of the State Constitution and statutes, and the powers

of local municipal corporations, must be regarded by the Federal courts as controlling when their application involves no infringement of any right granted or secured by the Constitution of the United States."

(c) The Electric Company obtained valuable concessions in consideration of its agreement to "never charge more than five cents for one fare," etc., which it and its lessee, the Power Company, still retain and enjoy, and have retained and enjoyed for over twenty years. Not only was the right granted to lay a double track in the streets of Decatur, but permission was given the Electric Company by the town to take up the tracks of the Atlanta Railway Company line and abandon its operation, which was done. It would be unconscionable to allow the Electric Company to accept a perpetual franchise to use the streets of Decatur, abandon the operation of the Atlanta Railway line, thus saving the expense for all time of operating and maintaining two lines when the company claimed it needed only one, and not force it to comply with the rate provision of the contract, tract, which was the real consideration passing from the Company to the town.

Before the Supreme Court of Georgia, the plaintiffs in error relied strongly on the case of the City of San Antonio vs. San Antonio Public Service Co., 255 U. S. 547. But there is a clear distinction between that case and the case at bar. In the San Antonio case the ordinance provided that the railway company "shall charge 5 cents fare for one continuous ride," etc., whereas the contract under review requires the railway company "to never charge more than five cents," etc., the first fixing an absolute fare, five cents, the other fixing a maximum fare only, and not giving an absolute right to charge five cents. There was no grant of a "privilege or immunity," but a contractual limitation upon the power of the Electric Company.

**Georgia Railroad vs. Smith;**

**70 Ga., 699 (2); affirmed in Georgia Railroad vs. Smith,  
128 U. S. 174, 32 L. Ed. 377.**

Again, there is a very material difference between the constitutional provision in the San Antonio case, which is as fol-

lows: "No irrevocable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof"; and the provision of the Georgia Constitution, which is as follows: "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed."

The Texas Constitution deals with "privileges and immunities" granted by the legislature or created under its authority, but the Georgia Constitution deals only with "laws passed," as the context clearly shows.

The Town of Decatur in annexing to its ordinance, which was made a part of the contract of 1903, the condition that the Electric Company should "never charge more than five cents," etc., was not acting under the authority of the legislature, but independently of the legislature and under the Constitution itself, which forbids the construction of a line of street railway within its limits without its consent.

Again no *special* privilege or immunity was granted in the contract under review, for, in order that a privilege or immunity may be *special*, it must be *exclusive*, which is not true of the grant in the case at bar.

**Old Colony Trust Co. vs. City of Omaha, 230 U. S. 115-116,  
57 L. Ed. 1416.**

Franchise to use streets not being exclusive is not a special privilege or immunity.

**Omaha Electric Light & Power Co. vs. Omaha, 172 Fed.  
494-498.**

Neither the power of a municipality to contract with a third party for the construction and operation of waterworks, street railways, or the public utilities, nor the right of such a third party under such a contract, constitutes a special privilege or immunity, within the meaning of those terms in Section 16, Art I, of the Constitution of Nebraska which prohibits the leg-

islature from making irrevocable grant of special privileges or immunities.

**Omaha Water Co. vs. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736;**

**8 Ann. Cas. 614 (citing Walla Walla vs. Walla Walla Water Co., 172 U. S. 1-17, 43 L. Ed. 341**

**Detroit vs. Detroit Citizens St. R. Co., 184 U. S. 368-389; 46 L. Ed. 592.)**

The Supreme Court of Georgia in Georgia Railway & Power Co. vs. R. R. Com. of Georgia, 149 Ga. 1; Georgia Railway & Power Co. vs. Town of Decatur, 152 Ga. 143; Georgia R'y & Power Co. vs. Town of Decatur, 153 Ga. 329, has already passed on all questions as to the Constitution of Georgia under review here and upheld the contract. See Transcript p. 245, where additional sections of the Georgia Constitution were invoked by amendment.

Moreover, in San Antonio, the city by its charter, Sec. 100, existing at the time of the passage of the ordinance of 1899 had the power "exclusively \* \* \* to regulate everything connected with city railroads," in other words the power to regulate fares. Hence the court properly construed the ordinance of 1899 which stated that the company "shall charge a five cents fare" as a regulatory ordinance rather than a contract.

In other words, wherever the power exists in a municipality to regulate fares by ordinance, by charter or statute, and an ordinance is passed fixing a rate, the courts generally construe it as an exercise of the dominant, rate regulating power, rather than as a contract. This is the reasonable view because the city would not likely bind itself by an irrevocable contract rate when it has the dominant power to regulate the rate at its own volition. The court in the San Antonio case notes this, when it says:

"Indeed the result is persuasively established by the ruling in the Altgelt case to the effect that if the contract right were conceded, there would, in view of the constitutional restriction, be such an inevitable conflict between that

right, and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict between that right and the dominant power to regulate as to render the contract right inoperative, and therefore to cause it to perish from the mere fact of admitting its conflict with the authority to regulate."

This view of the San Antonio Ordinance of 1899 that it was not a contract but only a regulatory ordinance was strengthened by the fact that in the ordinances thereafter passed by the city it was never referred to as a contract but always as a regulation.

In the instant case, there is an agreement between the parties; it has all the elements of a contract in the first place. Again the city has the power to contract as to rates but not the power to regulate rates, just the reverse of the power of the City of San Antonio. Regulation under the Constitution of Georgia is lodged solely in the legislature or by delegation in its agent the Railroad Commission. The Georgia provision does not prohibit privileges granted by contract but only by law. The Texas Constitution prohibits grants by contract as well as by law. The Georgia provision prohibits only special privileges. The Texas provision refers to any privilege or franchise.

Moreover the agreement of 1903 is a contract or nothing. It must be upheld as a contract if upheld at all. If void as to the rate feature, then the whole is void and the grants from the city to the company, that is the franchises, are void. It does not lie in the mouth of the company to say that the rate feature is void and yet retain possession of the privileges which it obtained by the agreement.

The provision of the Constitution (Georgia Code, 6389) was enacted for the benefit of the State and its agents, that is towns and cities, and it therefore does not lie in the mouth of the company to whom the claimed special privilege is granted by contract to set up its invalidity by reason of the grant to it of this privilege when the grantor does not claim it and while the company retains possession of the franchises and consideration which it obtained from the grantor by reason of the contract.

Furthermore, a city in Georgia can not by contract fix a rate irrevocable by the State, since under the Constitution of Georgia the power to regulate rates is lodged in the General Assembly and the exercise of the police power of the State shall never be abridged. The State may at any time revoke the rate provision feature in the contract by repealing the proviso in the act of 1907 and thus conferring jurisdiction on the Railroad Commission, hence there could be no conflict between the rate provision in the contract and the constitutional provision above referred to that no law shall be passed making irrevocable grants of special privileges.

Further the Supreme Court of Georgia in holding this to be a valid contract necessarily held it to be not prohibited by and not in conflict with any constitutional provision of the State of Georgia.

"Its validity was attacked in a number of ways, and many constitutional objections were raised thereto; but when this court reaffirmed the ruling in the mandamus case and held that, independently of the mandamus order, the trial court did not err in granting the interlocutory order, it was an adjudication of every attack upon the validity of the contract in question, even though the numerous objections may not have been specifically ruled upon in the opinion of the court."

**Ga. R'y & P. Co. vs. Decatur, 153 Ga. 334, and cases cited.**

This court will follow the Supreme Court of Georgia in the construction of the Constitution and statutes of the State of Georgia.

## VI.

**THERE IS A MARKED DISTINCTION BETWEEN CONTRACTS WHICH ARE CLAIMED TO BE INVOLABLE AND THOSE WHICH ARE NOT; THAT IS, THOSE WHICH THE LEGISLATURE MAY TERMINATE AT ANY TIME.**

In the case of inviolable contracts, that is, those which it is claimed the Sovereign has no power to end, the authorities seem to hold that there must be an express grant of authority from

the State, and that it must be made for a length of time not unreasonably long.

But where the contract is made subject to the sovereign power of the State, in the exercise of its police power, to end it at any time, it may be made for an indefinite time, and will continue so long as the party obtaining valuable franchises and rights thereunder retains possession of and enjoys those franchises and rights. The parties themselves may agree to end it, or the State may step in and terminate it. The distinction is well expressed in the following case:

"To construe subdivision 9 of Section 1828 R. S. 1898, as authorizing railroad companies to make contracts for rates binding upon the State when it resumes rate-making power, would be to hold that the legislature could part with an attribute of sovereignty. This it cannot do. In a democracy there can be no abdication. Sovereignty is not subject to a perpetual gift, grant or barter. A perpetual grant *under sovereign power* may be made, but not a perpetual grant *of sovereign power*. The railroad company was but an agency of the State in regulating rates, and as such it had no authority to enter into a contract not subject to modification or revocation by the State."

**Minneapolis, etc., Ry. Co. vs. Manasha W. W. Co., 150 N. W. 413.**

This contract by the Town of Decatur is a grant *under sovereign power*. It is under the control of the State. The State may end it at any time.

Where a town attempts to exercise the sovereign power of the State and to make a grant in a contract which is claimed to be inviolable, that is, a grant *of sovereign power*, the sovereign must give this power expressly and the grant must be for a time not unreasonably long.

The case cited by plaintiffs in error in their brief, page 28, and cases like it, are easily distinguished from the instant case in this important respect, namely, that in those cases the Railroad Commission was given full power over rates. There was no

proviso in those cases, as in the act of August 23, 1907 (Code of Georgia, Sec. 2662), excepting contracts with municipalities from the jurisdiction of the Railroad Commission of Georgia.

In the Mitchell case, the city claimed to have an inviolable contract, that is, a contract which the State itself could not abrogate or annul. The Mitchell case is an attempt to set up a contract against the assertion of its police power by the State. If the legislature of Georgia should ever repeal the proviso in the Act of August 23, 1907, excepting municipal contracts from the jurisdiction of the Railroad Commission, and thereby confer full power on the Railroad Commission over all rates, and the Railroad Commission should exercise its jurisdiction thus conferred by fixing a rate on the North Decatur line, and the Town of Decatur should then attempt to set up an inviolable contract against the police power of the State of Georgia, then the Mitchell case, *supra*, and others like it cited by plaintiffs in error, would be applicable and pertinent, but until this happens these cases are as far from the instant case as the East is from West.

In the instant case there is no attempt to set up a contract against and in opposition to the exercise of the police power by the State. On the contrary the assertion of the contract right by the Town of Decatur is in harmony with the State. The contest here is between the municipality and the Street Railway, and the State is lined up with the municipality. The State of Georgia marches side by side with the municipality.

## VII.

### **THAT A RAILWAY COMPANY CANNOT OPERATE ITS RAILWAY AT A CERTAIN RATE OF FARE WITHOUT LOSS DOES NOT CONSTITUTE AN EXCUSE FOR FAILING TO DISCHARGE ITS DUTY TO THE PUBLIC, ARISING ON CONTRACT VOLUNTARILY ASSUMED.**

(a) In the first place there are no allegations of fact in the answer and cross bill, except a bare conclusion that the North Decatur line is maintained at a loss. No facts are shown to that effect, and no court could or would act upon a statement not supported by any facts.

It does not appear that any record is kept by the Company showing what percentage of the public boarding the cars on the main Decatur line ride through from Decatur to Atlanta, how many of them ride from a point within the corporate limits of Decatur, to some other point within the limits of Decatur, or how many boarding the cars within the corporate limits of Decatur ride to some point intermediate between Atlanta and Decatur. In other words, there are no allegations that show what percentage of the traffic on this line in reference to Decatur is through traffic or what percentage of it is local, and without these facts, it cannot be determined whether a five-cent fare is profitable or unprofitable. Some passengers ride for a short distance, others for a long distance, and the average distance of all the passengers must be taken into consideration in determining whether a line pays or not.

In the second place, it will be presumed that when the Railroad Commission fixed the rate at seven cents upon other lines upon the application of the Power Company for an increase that the Commission took into consideration the whole body of rates upon all lines of defendant companies, and fixed such a rate on the lines over which it had jurisdiction as would be fairly compensatory to the Company in the operation of its entire system.

In other words, the rate upon any one line cannot be considered and would not be considered by the Commission without taking into consideration the rate upon other lines. The whole body of rates would be considered by the Commission, and not those on a segregated line. If any such rate thus fixed by the Commission was not fairly compensatory, or was confiscatory, the Company might have appealed from the finding of the Commission and reviewed it in the courts. That was its remedy. Not having done so, it cannot complain now.

In the third place, we insist that the Company having voluntarily entered into this contract cannot repudiate this contract because the contract may be unprofitable or because they may have to operate this one line at a loss.

The proposition stated at the heading of this subdivision is sustained by abundant authorities. Courts do not make con-

tracts for parties. It is the duty of the courts to enforce contracts. The proposition stated at the heading of this subdivision is quoted from the case of Public Service Commission vs. International Railway Company, 172 N. Y. Sup. 551.

See also the following citation of authorities to the same effect:

"Where a telephone franchise does not authorize the company to make charges for installation and removal of telephones, the fact that if the Company was not allowed to make such charges, bankruptcy would result does not authorize the court to substitute another contract for that incorporated in the franchise."

**Greenville Telephone Co. vs. City of Greenville, 221 S. W. 995.**

"A franchise contract between a city and a street railroad company for a term of 25 years, fixing the rate of fare, is binding on both parties throughout the term, and cannot be terminated by the company on the ground that the continuance of normal labor conditions was an implied term, and that the abnormal increase in wages caused by the war and the action of the War Labor Board renders further performance at the fixed rate of fare impossible, because it would bankrupt the company. In such case, while such abnormal conditions were not contemplated by either party, the company might have guarded against them in the contract."

**Burr et. al. vs. City of Columbus, Ohio et al., 256 Fed. 261.**

"A section in a street railroad franchise providing that, in consideration of the rights conveyed to the grantee, he should not charge more than five cents for a single ride, is a contractual obligation, and not merely a regulative provision."

"The wisdom of insistence on a franchise contract fixing street railroad fares, which would bring disaster to the

railroad company, is not a question for the courts to decide."

**Meridian Light & Ry. Co. vs. City of Meridian et al.**, 265 Fed. 765.

See also

**Columbus Ry. & Power Co. vs. Columbus**, 249 U. S. 399, 6 A. L. R. 1648, and note page 1659.

"Neither the Constitution of the State or the Nation gives the courts the power to save anyone from a valid contract merely because it will entail great or even irreparable injury to perform according to the contract."

"Chancery cannot by injunction interfere with a contract fixing rates of fare chargeable by a street railroad, on the ground that the contract is improvident."

**Ottumwa Ry. & Light Co. vs. City of Ottumwa et al. (Iowa)**, 173 N. W. 270.

"That a railway company cannot operate its railway at a certain rate of fare without loss does not constitute an excuse for failing to discharge its duty to the public, arising on contract voluntarily assumed."

"In regard to the modification or abrogation of contract obligations voluntarily assumed, public service corporations stand on the same footing as individuals."

"That the employees of a public service corporation demand wages which the corporation regards as excessive does not relieve it from its contract obligations to the public."

**Public Service Commission, Second Dist., vs. International Ry. Co.**, 172 N. Y. Supp. 551.

"A public utility need not be assured a fair and reasonable return on its investments over and above the actual cost of providing adequate, efficient and safe service, when

the conditions are grossly abnormal on account of a war, and are necessarily temporary."

**Salt Lake City et al. vs. Utah Light & Traction Co., 173 Pac. 556, 3 A. L. R. 715. (See note page 730.)**

"An injunction restraining violation by a street railway of the conditions of its franchise cannot be denied merely because such conditions render its business unprofitable."

**Public Service Commission vs. Westchester St. Ry. Co., 99 N. E. 536, 538.**

See also

**Muscatine Lighting Company vs. City of Muscatine, 256 Fed. 929 (3) and (5).**

The reasonableness of any single rate should be determined with reference to the general schedule of rates on all lines of defendant companies. Also, the fares, charged on one line must be considered in connection with the fares charged on other lines of the entire system. In other words, the courts cannot segregate one line, and determine whether the rate on that line is compensatory or not. The reasonableness or unreasonableness of a single rate cannot be determined without a general schedule of rates. Courts cannot fix rates, but may restrain the Commission from enforcing an unreasonable body of rates.

**Southern Railway Co. vs. Atlanta Stove Works, 128 Ga. 208 (3) and (6).**

It will be presumed that the Commission in fixing the rate of seven cents upon other lines of defendant companies considered the entire body of rates on its entire system. If defendant companies were dissatisfied with the rate so fixed it could review that finding of the Commission in the courts.

**4 R. C. L. 653; Trammell vs. Dinsmore, 102 Fed 794; affirmed, 183 U. S. 115.**

**Powhatan Coal Co., 171 Fed. 723; affirmed, 178 Fed. 266.**

All parts of railroad system profitable and unprofitable should be embraced in the computation of rates.

**Groesbeck vs. Duluth, etc., Ry. Co., 250 U. S. 607.**

**Puget Sound Traction Company vs. Reynolds, and others constituting Public Service Commission, 61 Law Edition 1325, 244 U. S. 574.**

In this case, the following rule is laid down:

"Whether an order of a Public Service Commission requiring street railway passengers to be carried beyond the limits of the particular franchises covering those lines, and at a reduced rate, is confiscatory or otherwise arbitrary within the inhibition of U. S. Const., 14th Amend., is not to be determined with reference to earning and operating expenses of the lines in question, separately considered, where such lines are and have long been operated as parts of a system."

See also numerous authorities on this proposition cited in the Attorney General's brief in this case, at the bottom of first column, page 1328, Law Edition.

If the seven-cent rate fixed by the Commission on all defendant company's lines, except the main or North Decatur line and the College Park line, was not compensatory when the entire system of defendant companies is considered, defendant's remedy was to take prompt steps to review this ruling of the Commission in the courts. Not having done so, they cannot now raise this issue collaterally in this proceeding.

It will be clearly seen from the foregoing citation of authorities in this brief that there is no legal defense set up by defendant companies that since the order of the Commission fixing a rate of seven cents and asking an increase of service in certain respects on defendant companies' lines that the maximum rate agreed upon in the contract of 1903 with the Town of Decatur is (1) not compensatory, is confiscatory, and without due process of law and in violation of the Constitution of the United States, and of the Constitution of Georgia (Civil Code, Section 6358,

6359), (Transcript p. 235), or (2) that it hampers defendants and interferes with their duty to other patrons. (Transcript p. 229.)

See also:

**Southern Iowa Electric Co. vs. City of Chariton, 255 U. S. 539 (2 & 3), 65 L. Ed. 764 (2 & 3).**

### VIII.

#### **THE DEFENDANT COMPANIES ARE ESTOPPED FROM QUESTIONING THE REASONABLENESS OF THE RATE FIXED BY CONTRACT WITH THE TOWN OF DECATUR.**

It does not lie in the mouth of defendant companies after obtaining the consent of the Town of Decatur to the removal of the Atlanta Railway Company line, and after enjoying the privilege of not having to maintain this line for 18 years, and after obtaining the franchises and rights under this contract, of which they are still in possession, to now question the reasonableness of the rate fixed by that contract.

"Publ. St. 1882, c. 113, Sec. 43, provides for the fixing of fares by the directors of a street railway, section 44 provides that on certain applications the Board of Railroad Commissioners shall revise and regulate fares, etc., and section 45 provides that nothing in the two preceding sections shall authorize a company or the board to raise the fare above the rate established "for a locality" by agreement made as a condition of location or otherwise, except by mutual agreement with the local authorities. St. 1898, p. 743, c. 578, sec. 13, in force October 1, 1898, in effect withdrew the right of municipal officers to impose conditions regulating and restricting fares, but confirmed prior locations and continued them, subject to regulations of conditions in force. Held that, in view of the statutes, the municipal officers, granting a location under which a street railway was organized prior to October, 1898, could impose restrictions as to the fares not unlawful in themselves and

the reasonableness thereof could not be thereafter questioned by a street railway company organized on the basis of such location and restriction.

"By Publ. St. 1882, c. 113, sections 43-45, the legislature intended to give the Board of Railroad Commissioners power to regulate the fares charged by street railway companies, whether or not fixed in accordance with restrictions imposed by municipal officers, subject to the condition that fares so established for a municipality should not be raised, except by mutual agreement with such officials; and even if the fares between a city granting a location and another city in the State was not established "for a locality" within the meaning of the statute, a street railway company cannot complain of the fares fixed in granting a location when no attempt has been made to have the fares revised by the Railroad Commissioners.

Page 511. "And it may be added that we do not understand it to be contended that this restriction created any undue burden upon the street railway company when it was first imposed. Neither the defendant's answer nor the agreed facts go further than to state that the charge of half rates yields at present less than the cost of carriage, by reason of the increase in the last six years of the cost of maintaining and operating the defendant's railway. But we can pass only upon the validity of the restriction as originally imposed and assented to by the defendant's predecessor in title and voluntarily assumed by the defendant."

The restrictions required half fare for pupils attending school in Worcester.

**Murphy et al. vs. Worcester Consol. St. Ry. Co., 85 N. E. 507.**

Page 114. "It is plain that the constitution and the statute cited give the absolute power to the city, and it does not lie in the mouth of the plaintiff, who obtained this consent, to urge that the condition limiting it to a carriage of passengers is unreasonable."

**St. Louis & M. R. R. Co. vs. City of Kirkwood, 60 S. W. 110.**

See also

**Columbus Railway, Power & Light Co. vs. City of Columbus, 249 U. S. 399.**

"Telephone company which accepts conditions of an ordinance as to rates to be charged by a municipal corporation as a condition to the use of its streets or conduits cannot complain if the rates are not reasonable."

**Simons Sons vs. Tel. & Tel. Co., 99 Md. 142 (4), 57 Atl. 193 (4).**

See also

**Pond vs. New Rochelle Water Co., 183 N. Y. 330, 76 N. E. 211.**

In the case of *Farnsworth vs. Boro Oil & Gas Co.*, 109 N. E. 860, the court said in head note (6) :

"The inhabitants of a town might enforce a valid contract by a gas company with the town relative to the amount to be charged for gas, and it was immaterial whether the contract was valid by force of an estoppel, or for some other reason."

(Page 861.) "I think the defendant is estopped to deny the binding force of its agreement. It applied to the town board for permission to lay its pipes in the highways of the town, and it received the permission for which it prayed. The privilege may be one that the board was not competent to grant, but at least it believed itself competent, and the defendant shared that belief. There was a claim of right which the defendant extinguished for a price. The board asserted the power to regulate the use of the highway and to prevent the defendant's entry. The defendant yielded to the claim and purchased the coveted consent. It received the very benefit which it sought, the opportunity to lay its mains without molestation of its possession or question of its right. It did not intend to occupy a street as a trespasser. It intended to occupy them under color of the right which the consent of the board conferred. Under color of

that right it went into possession, and it has retained that possession, undisturbed and unchallenged, for nearly 14 years.

(Page 862.) "In such circumstances, the defendant will not be heard to say, while retaining possession of the highway, that the consent under which it entered was valueless and void. Its position is the same as that of a lessee who has gone into possession in submission to the title of the lessor. It is the same as that of a licensee who has acquired the right to manufacture under an outstanding, though defective, patent. The lessee will not be heard to say that the lessor had no title to convey."

See also

**City of Louisville vs. Cumberland Telephone & Telegraph Co.**, 224 U. S. 648 (4), 56 L. Ed. 934 (4).

## IX.

### NO ACT OF THE RAILROAD COMMISSION CAN RENDER INVALID A VALID AND SUBSISTING CONTRACT OVER WHICH IT HAS NO JURISDICTION.

(a) The Railroad Commission is simply an agent of the General Assembly of Georgia, a creature of the General Assembly.

The Commission cannot do indirectly what it cannot do directly.

It has no jurisdiction over rates on the North Decatur line from Atlanta to Decatur.

The General Assembly by the proviso in the Act of 1907 has expressly preserved this contract and similar contracts.

By its refusal since then, (see the refusal to touch these contracts in the legislation on the Lawrence bill—Transcript p. 26) to repeal this proviso, the Legislature evidences the public policy of the State to preserve these contracts to the cities and towns which have had the wisdom and forethought to make them, and

which have given consideration therefor in the way of franchises and other privileges.

To say, therefore, that an agent of the General Assembly can nullify this contract indirectly by its rate-fixing power on other lines would be to say that the agent can do what the principal has said shall not be done, would be to say that the creature is greater than the creator. It needs no further argument and no citation of authorities. It seems to us to say that no defense is set up in Section 43 of the cross bill, viz., that the Act of the Railroad Commission in fixing a rate of seven cents on other lines automatically suspends and sets aside the contract provision fixing a maximum rate as an addition to the franchises and other rights granted in said contract with the Town of Decatur. (See Section 43 of cross bill—Transcript p. 230.)

Furthermore, all allegations as to what the Railroad Commission may have done or said as to the rates of fare on said North Decatur line, are irrelevant and immaterial, are entirely gratuitous remarks of the Commission in a matter over which they had no jurisdiction and no authority. Why these remarks were made we do not know. They doubtless have had the effect to encourage defendant companies to attempt to repudiate its solemn contract. If so, it has involved the Town of Decatur in a law suit to maintain its right under a solemn contract. Thus the Town of Decatur has been done an injury and an injustice in a matter over which the Supreme Court of Georgia has said the Commission had no jurisdiction. If the Commission had gone into a hearing of the matter and had considered that the five-cent rate in this contract of 1903 extended over a period of 18 years, and had considered the value of the grants given by the Town of Decatur to the Company, the conclusion would have been inevitable that the Town of Decatur was entitled to the rate fixed by its contract, and that the rate was fairly compensatory and reasonable under all the circumstances. At any rate, the declaration in a matter not before them, over which they had no jurisdiction, is not binding on the Town of Decatur, is irrelevant, and should not have been considered by the trial court, doubtless was not considered in passing on this case, and should not be considered by this Court.

There has been no legislative action to terminate this contract, neither is the contract forbidden by Constitution or statute law of Georgia. To the contrary, the Legislative policy has been to preserve these contracts. As indicative of that we call atention to an Act of General Assembly of Georgia approved Aug. 16, 1921 (Georgia Acts, 1921, page 111) which was an Act touching the incorporation and powers of interurban railroads operated by gas or electricity and the jurisdiction of the Railroad Commission over same, in which (Sec. 1, 2597 (E) the following language is used:

"Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any railroad company or any street or interurban railroad or railway company, and provided this Act shall not operate as a repeal of any existing municipal ordinance. And the Railroad Commission shall not have the power and authority under this Act to increase the fares on the lines of such companies which have heretofore been fixed by contract between such companies and any municipality."

This repetition of the proviso in the Act of 1907 with the added language as above stated, indicates the determined public policy of the State that these contracts shall not be interfered with.

## X.

### ACT OF 1907 AND THE PROVISO THEREIN (CIVIL CODE SECTION 2662) ARE NOT UNCONSTITUTIONAL AND VOID.

(a) It is asserted that the order of the Commission fixing a seven-cent rate on other lines and ordering an increase of service is confiscatory, and violates the Constitution of the United States and the Constitution of Georgia, (Sections 6358 and 6359). See Section 52 of cross bill—Transcript p. 235), and, therefore, that the Act of 1907 is unconstitutional.

Exactly by what process of reasoning this is arrived at we cannot see. How an Act of the Railroad Commission in fixing rates on lines of defendant companies could render unconstitutional an Act of the General Assembly we are unable to perceive.

The reasoning applied in the preceding subdivision is a complete reply to this contention, if, in fact, it needs any reply.

It is further asserted that the proviso of 1907 is unconstitutional and void, and violates certain sections of the Constitution of the United States and the Constitution of Georgia. (See Section 53 of cross bill—Transcript p. 236). It is claimed no legal distinction and separate classification is made between contracts made prior to 1907 and those made subsequent thereto, and that for other reasons said proviso is unconstitutional and void.

We call attention to the recent case of

**Arkansas Natural Gas Co. vs. Arkansas R. R. Com. et al.  
decided by this Court March 19, 1923 (No. 500 Oct.  
Term, 1922,**

in which that Court said:

“While a State *may* exercise its legislative power to regulate public utilities and fix rates, notwithstanding the effect may be to modify or abrogate private contracts, there is quite clearly no principle *which imposes an obligation to do so*, merely to relieve a contracting party from the burdens of an improvident undertaking.”

The power conferred by the Legislature on the Railroad Commission in this case excepted from its jurisdiction the “power to modify or impair any existing contracts for supplying gas to persons, firms, corporations, municipalities, etc.” and this Court held the classification to be legal.

See also

**Springfield Gas Co. vs. Springfield, Advance sheets 66 L.  
Ed. 38.**

**Crescent Cotton Oil Co. vs. Mississippi, Advance sheets  
66 L. Ed., 55.**

There is no merit in the attack sought to be made upon the Act of August 23, 1907.

The constitutionality of the Act must be determined as of the date of its passage. The Legislature is supreme in the matter of

rates. It is part of its police power. It may or may not exercise this power. It chose not to exercise it or to give it to its agent, the Commissioin, in cases covered by the proviso of 1907.

The classification is reasonable and right, in that it preserves only valid and subsisting contracts made prior to the Act of 1907. In that way, it draws a distinction between contracts made before and contracts made after the Act of 1907.

Classification as to contracts with towns and cities is also a reasonable classification and distinction. The Legislature doubtless had in mind that contracts made with towns and cities would be for the public good and that the public generally would get the benefit of those contracts. That is no doubt the reason it did not include in this proviso contracts made with private parties. This classification was reasonable and right and valid.

Furthermore, in the mandamus case, the Power Company attacked the Act of 1907 as unconstitutional and void. The Court in said mandamus case necessarily decided against this contention in finding that this contract was covered by the proviso in the Act of August 23, 1907, and that because of this Act, the Commission had no jurisdiction over this contract. Hence, the attack on the constitutionality of the Act of 1907 and the proviso therein, (See Sections 52 and 53 of cross bill—Transcript pp. 235-236), has been decided by the judgment in said mandamus case adversely to the contention of the defendants in this case.

Furthermore, the defnedants could take no comfort if the Act of 1907 were void. If that is unconstitutional and void, in what position does it leave defendant companies? It leaves the Railroad Commission without jurisdiction over street railroads if that Act is unconstitutional. It makes all acts of the Railroad Commission attempting to fix rates over street railway lines absolutely void. The seven-cent rate fixed by the Commission over other lines of defendant companies is void and has no effect. Where does this contention leave the Town of Decatur and defendant companies? It leaves them with a contract fixing the maximum rate at five cents, and all questions raised in this suit discriminatory and otherwise absolutely eliminated.

Further, as to the alleged order of the Commission for an increase of service (See Sections 51 and 52 of cross bill—Transcript p. 235), what has heretofore been said will also apply to that contention, viz.: that if the rate fixed in consideration of the entire body of rates and the increase of service ordered was not adequate, the Power Company had its remedy by appealing to the Courts to review the ruling of the Commission. Failing to do this, it is concluded on this question, and this Court must presume that the rates fixed were fairly compensatory when the entire body of rates on its entire system and the service required thereon were considered.

The trial court had no jurisdiction of this question as a primary proposition. It can only act as a court of review.

See authorities heretofore cited in this brief.

The remedy of defendant, if it is dissatisfied with the ruling of the Commission, is to again apply to the Commission for relief, and if dissatisfied with the ruling of the Commission, it can review that ruling in the courts.

It may be stated in this connection that the assertion in the cross bill that the Town of Decatur made application to the Commission for an increase of service is not a fact. The affidavit of Mr. Steele, Mayor of the Town of Decatur, in this regard, shows that the Town of Decatur has never made application to the Commission for an increase of service on the main or North Decatur line. (Transcript p. 28.)

## XI.

### DEFENDANT COMPANIES ARE ESTOPPED FROM PLEADING LACK OF AUTHORITY ON THEIR PART TO MAKE CONTRACT OF 1903.

(a) It does not lie in the mouth of defendant companies who have received the benefits of this contract to question its validity. Hence, the defendants are estopped from setting up the defense attempted to be set up in Section 42 of the cross bill (Transcript p. 230), even if there were any merit in those contentions. It is

there asserted that said contract of 1903 fixing rates was ultra vires the power of the Electric Company to enter into same; that it cannot enter into any contract against public policy; that said contract is violative of Section 6467 of the Constitution of Georgia against giving a rebate or bonus, and also of Section 6463, prohibiting unjust discrimination. As a matter of fact, this contract is not violative of either Constitutional provision. This subject will be treated later.

It is sufficient at this time to say that defendants cannot raise this question.

In the case of *City of Belfast vs. Belfast Water Company*, 115 Me. 234, 98 Atl. 738, the Court says:

1. "If a corporation expressly or impliedly adopts the contract made by its promoters and obtains its benefits, it must also take the obligations and burdens."
2. "When a party has accepted the benefits of a contract, not *contra bonos mores*, he is estopped to question its validity."
3. "Although the ultra vires contract of a municipality is a legal wrong, its illegality can be set up only by the person who suffers thereby, and not by one who obtains the benefits of such contract."
4. "Where a water company adopts a contract of its promoters to furnish water to the city and performed it for 30 years and then claiming that it was illegal, threatened to cut off the public supply, the city could by injunction restrain the cutting off of the water."

See the following cases cited as supported (2):

2. "It has been repeatedly held, and we think with good reason, that when a party has accepted the benefits of a contract, not *contra bonos mores*, he should not be permitted to question the validity of it; that he is estopped. *Ft. Worth City Co. vs. Smith Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167; *Richardson vs. Welch*, 47 Mich. 309, 11 N. W. 172; *Doane vs. Lake Street, etc., R. R. Co.*, 165 Ill. 510, 46 N. E. 520, 36 L. R.

A. 97, 56 Am. St. Rep. 265; Collins vs. Cobe, 202 Ill. 469, 66 N. E. 1079; State vs. Germania Bank, 90 Minn. 150, 95 N. W. 1116; Gibbs vs. Craig, 58 N. J. Law 661, 33 Atl. 1052; Flower vs. Barnekoff, 20 Or. 132, 25 Pac. 370, 11 L. R. A. 149; Dyer vs. Walker, 40 Pa. 157.

2. "Parsons on Contracts, 961. And in Joy vs. St. Louis, 138, U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 834, where a railroad company was in the enjoyment of a right of way through a park, and had received the benefit of a large sum of money expended by park commissioners, under an agreement with them, the Court said that, without offering to return the property obtained by virtue of the agreement, it could not be heard to allege that the agreement was against the policy of the law."

See also

People's vs. Suburban Railway Co., 49 L. R. A. 650 (3).

## XII.

**THAT THE CONSTRUCTION PLACED UPON THE CONTRACT OF 1903 BY THE SUPREME COURT OF GEORGIA MAKES SAID CONTRACT APPLY TO TERRITORY SUBSEQUENTLY INCORPORATED IN THE TOWN OF DECATUR DOES NOT IMPAIR THE OBLIGATION OF THE CONTRACT.**

This identical question has been decided adversely to the contention of plaintiffs in error. See the following cases:

**Peterson vs. Tacoma Railway & Power Co., 140 Am. St. R., 936(4);**

**Illinois Cent. R. R. Co. vs. City of Chicago, 176 U. S., 646, 44 L. Ed., 622;**

**People vs. Detroit United Railway, 139 A. S. R., 582;**

**Almand vs. Atlanta Consolidated St. Ry. Co., 108 Ga., 417;**

Not only have contracts of the kind here involved been repeatedly applied by the Courts to territory subsequently added to a

city, but it has frequently been held that a municipality may fix a rate of fare effective beyond its limits.

**Public Service Commission vs. Westchester St. Ry. Co., 99 N. E. 536-538.**

See also

**Interurban Ry. & Ter. Co., et al. vs. Cincinnati, 93 Ohio St. 108; 112 N. E. 186.**

Railway Company contended village was without authority to contract for fares beyond the municipal limits.

**City of Detroit vs. Detroit United Railway, 139 N. W. 56 (1) (3); 165 Mich. 28, 150 N. W. 358;**

**Rice vs. Detroit Ry. Co., 81 N. W. 927;**

**People vs. Barnard Comptroller, 110 N. Y. 548, 18 N. E. 354;**

**Vining vs. Detroit Ry. Co., 95 N. W. 542;**

**Adams vs. Union R. R. Co., 42 Atl. 515;**

**Kissane vs. Detroit Ry. Co., 79 N. W. 1104;**

**Manitowoc vs. Manitowoc, etc., Traction Co., 129 N. W. 925;**

**St. Louis, etc., R. R. Co. vs. City of Kirkwood, 60 S. W. 110.**

The following cases hold that under a contract similar to the contract of 1903, it is the duty of the street car company to preserve the contract rate for passengers not only from one town to the other, but also as to passengers boarding the car or cars at points intermediate to the towns.

**Rice vs. Detroit, etc., Ry. Co., 48 L. R. A. 84;**

**City of Raleigh vs. Carolina Power Co., 104 S. E. 462.**

## CONSTRUCTION OF CONTRACT.

It is a far-fetched contention that a five-cent rate under this contract of 1903 only applied from one point in Decatur, to-wit, Ansley's Drug Store, to the terminus in the City of Atlanta, and that passengers who got on at other points must pay 7c. It is also a far-fetched contention that the provision for the grant of transfers upon the payment of one full fare means the payment of a fare of 7c.

The admitted facts in the case show that for a period of 18 years, that is, from April 1, 1903, up to the present time, defendant companies have charged and collected a five-cent fare upon said North Decatur line from all points in the Town of Decatur to the City of Atlanta, and all points upon defendant's lines, and vice versa, from the City of Atlanta and all points on defendant company's lines to all points within the Town of Decatur from all passengers who take passage on said Decatur line, and that said companies have also given during said period transfers when requested upon the payment of a five-cent fare; that the foregoing has been the universal practice and custom of defendants since April 1, 1903. Facts further show that the loop on the present main or North Decatur line as referred to in contract of April 1, 1903, begins at the intersection of McDonough and Howard Streets, in the Town of Decatur, and extends through the Town of Decatur and returns to the same point at the intersection of Howard Avenue and McDonough Street, and that the point referred to in paragraph 34 of defendant's cross bill as the terminus of said North Decatur line is on said loop, and not a terminus at all. (See affidavit of Mr. J. Howell Green, Transcript page 27.) See also paragraphs 1, 2 and 3 of amendment. (Transcript pages 69 and 70.)

The contract itself by its very terms also shows that the construction as above stated, which the parties themselves have always placed upon it, is the construction which was intended by the parties to the contract. The granting of a transfer ticket as provided in the contract is for the purpose of giving one continuous ride from any point within the Town of Decatur upon

said Rapid Transit line to any point within the City of Atlanta on any of its lines in said city, or vice versa, etc. (See third paragraph of Section 2 of the Ordinance, Transcript page 57.) As will clearly be seen by an examination of the contract, it was the intention of the parties that the five-cent fare should cover transportation of passengers from any point in the Town of Decatur to the City of Atlanta on any of its lines in said city, or vice versa, and we also insist that the contract further covers fares from and to intermediate points between the Town of Decatur and the City of Atlanta.

It will clearly be seen from an examination of the contract also that one full fare means one full fare at the time the contract was made; that is, a fare of five cents. This is the construction that the parties themselves have continually placed upon the contract. The general rules of construction of contracts under the laws of Georgia can well be applied to this case, (1) That the intention of the parties to the contract should govern; (2) That it should be construed more strongly against the party undertaking the obligation; (3) That it should be construed in the sense put upon it by the parties at the time it was made and subsequently to that time; (4) That the substantial purpose of the contract will control.

The construction put on the contract by defendant companies for 18 years should control.

**Rice vs. Detroit, 81 N. W. 927; 130 N. W. 358.**

A public contract should be construed liberally in favor of the public.

**Muncie Natural Gas Company vs. City of Muncie, 160 Ind. 97 (7); 60 L. R. A. 822 (7).**

In cases of doubt, contract construed in favor of City.

**St. Helena vs. San Francisco, etc., Ry., 24 Cal. App. 71; 140 Pac. 600;**

Contract construed strictly against Railway Company.

**West Bloomfield vs. Detroit United Ry. Co., 109 N. W. 258; People vs. Detroit United Ry., 127 N. W. 748.**

**DEFENDANT COMPANIES HAVE NO POWER TO SUR-  
RENDER THEIR FRANCHISE UNLESS ACCEPTED BY THE  
TOWN OR STATE.**

**White, Receiver vs. Davis, Receiver, 134 Ga., 274;**

**Harris vs. Muskingum Mfg. Co., 29 Am. D., 374;**

**7 R. C. L., 705 (709);**

**2 Kent, 310.**

**State and City of Bridgton vs. Bridgton & Millville Traction Co., 45 L. R. A. 837 (1) and (2), 33 Atl. 704;**

**Columbus Ry, etc., Co. vs. Columbus, 249 U. S. 399;**

**Public Service Com. vs. Westchester Ry. Co., 99 N. E. 536.**

**DEFENDANTS ESTOPPED BY JUDGMENT IN MANDAMUS CASE. (CIVIL CODE, SECTION 4335.)**

The determination of the questions raised in the mandamus case, whether the Railroad Commission had jurisdiction over the rates of fares on the lines therein named, operated by the Power Company under lease from the Electric Company, was a public question in which the public was interested. All members of the interested public were represented in that suit. The Commission, as a public body, an agency of the State, represents the public. And all members of the public are concluded by that judgment. If this were not so, then any interested person, natural, or artificial, might bring this suit over and have the trial Court and the Supreme Court try the same matter again and again. The Court would stultify itself to hold that this could be done.

In the case of *San Diego Land & Town Co. vs. Jasper, et al.*, 110 Fed. 702, 712, the Court said:

"Every person to whom the rates fixed apply—in other words, the public—is interested in the question, and the rep-

representative of this public in the matter is the board of supervisors, each member of whom was made a party defendant to the suit, and all of whom appeared to the bill and interposed a defense in behalf of all the parties interested."

See also

**23 Cyc, page 1269.**

Hence, the intervenors, being members of the public, were represented by the members of the Commission, and are concluded by the judgment in the mandamus case. For another reason, the intervenors are concluded by the judgment in that case, *vix*, that they take the case as they find it. This will be discussed later.

An analogous case is that of validation of bonds, where it is held that all citizens and taxpayers, though not actual parties in the suit, are bound by the judgment of validation. They are represented by the State through the Solicitor General.

**Thomas vs. City of Blakely, et al., 144 Ga. 488.**

**Union Dry Goods Co. vs. Georgia Public Service Corp., 145 Ga. 658.**

"An order of the Railroad Commission, fixing a schedule of rates to be charged by public-service companies in a given municipality, is not invalid solely because a contract-holder of one of the public-service companies was not made a party and notified of the proceedings before the Commission."

**San Francisco Gas & Electric Co. vs. City of San Francisco, et al. 164 Fed. 884, 887, and cases cited, pages 887 and 888;**

**Railway Company vs. Minnesota, 134 U. S. 418.**

The Town of Decatur was concluded by that judgment. It was served with notice of the application filed with the Commission by the Power Company, asking for an increase in rates, and appeared by counsel in opposition to the application before the Commission. Though not an actual party in the mandamus suit, it

was represented in that suit by the Commission, and, therefore, was concluded by the judgment of that case. If the decision had been adverse to Decatur, as it was to Atlanta, the Town of Decatur would have been concluded just as Atlanta now is concluded, and we hardly suppose counsel for the Power Company would insist that Atlanta is not concluded by the judgment in the mandamus case, because it was not a party in that suit.

"Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person."

23 Cyc. 1245.

In the case of Snow Steam Pump Works vs. Homer, 155 S. W. 405, 410 (6), (7) and (8), the Court said:

"These relators are estopped by the judgment in the mandamus case."

See the discussion of the Court in this case.

Plaintiffs in error, concluded as to all issues, which were issues in the mandamus suit, 149 Ga., and as to all matters or questions, State and Federal, which might have been put in issue in that suit.

That case, in which the Ga. Ry. & Power Co. was the plaintiff, directly involved the validity of this identical contract of 1903 with the Town of Decatur, and the plaintiff attacked the validity of this agreement of 1903 with the Town of Decatur upon a number of grounds, some of them constitutional (Transcript of record, page 89).

The petition of the Power Company in the mandamus case is shown in Transcript of record, pages 76 to 91.

The Supreme Court of Georgia in that case held this identical contract to be a valid and subsisting contract. The Power Com-

pany in that case could have raised the Federal questions now attempted, but did not do so and did not except to that decision to this Court. It is, therefore, concluded by that decision, in other words it is *readjudicata*.

If, however, this Court should hold that the decision of the Supreme Court of Georgia in the mandamus case, does not conclude the plaintiffs in error on the Federal questions which might have been raised as *res adjudicata*, then we insist that that decision of the Georgia Supreme Court of Georgia holding this agreement of 1903 to be a valid and subsisting contract is conclusively binding on this Court.

## XVI.

### THE ELECTRIC COMPANY IS IN PRIVITY WITH THE POWER COMPANY, AND IS CONCLUDED BY THE JUDGMENT AGAINST THE POWER COMPANY IN THE MANDAMUS SUIT.

Persons in privity with actual party in suit are bound by the judgment.

23 Cyc., page 1253.

Is the Electric Company in privity with the Power Company as to the litigation, or the subject matter of the suit in the mandamus case? We assert that it is.

The purpose of that suit was to force the Railroad Commission to take jurisdiction over the fixing of fares on lines of defendant companies, including the North Decatur line. The effect of that suit, if the Power Company had succeeded, would have been to strike down this contract of 1903 with the Electric Company, and release the Electric Company from its contract with the Town of Decatur. The Electric Company would have benefited by that litigation if the Power Company had succeeded. The Power Company was, therefore, litigating for the Electric Company, as well as for itself. Their interests were mutual, and where interests of parties are mutual, they are in privity.

"Where the interests of parties are mutual, although the suit is in the name of one, both are represented, and both are estopped to deny any of the issues adjudicated in any suit jointly or singly on one side and the same defendant on the other side."

**Carmody vs. Hanick, 85 Mo. App. 659.**

The mutuality of interests of the Power Company and the Electric Company in the subject matter of litigation in the mandamus case, to-wit, the effort of the Company to force the Commission to take jurisdiction and thus break the contract of 1903 with Decatur, is shown by the record in the mandamus case. See the exhibits thereto attached as an exhibit in that case. (Transcript, pages 160 to 163.) It appears that one item which the Power Company paid in 1917 out of its total net income (less taxes) of \$2,975,983.00, was an annual contract rental for leased properties of the Electric Company of \$1,605,572.00, which was something over 50 per cent of its net income above named. The Power Company gets all of the revenue earned by the Electric Company and in turn pays all the expenses, interests, taxes and other fixed charges, and in addition, pays to the stockholders of the Electric Company in annual dividends 5 per cent on their preferred stock, and 8 per cent on their common stock. Hence, it is evident that an increase is asked of the Commission, and the Commission is asked to take jurisdiction for the purpose of enabling the Power Company to meet these fixed charges in favor of the Electric Company for the use of its properties, and these fixed charges for the year 1917 are shown to be over 50 per cent of its net income.

As further showing their mutuality of interest, when this notice was served attempting to terminate this contract, it was served jointly by the Power Company and the Electric Company. (Transcript, page 58.) They are acting together in attempting to abrogate this contract, acting in concert. The same counsel represents them. They are Siamese Twins. If they have two hearts, they beat as one; they are united in the unholy bond of attempting to break a solemn contract made by one and assumed by the other.

Further, whatever interest the Electric Company has now, since its assignment of interest to the Power Company, is under or through the Power Company. It is the obligee of the Power Company. Its interest in the mandamus litigation was as obligee of the Power Company. Unless it is thus interested, then it has no interest in this suit and no standing in Court, except as a nominal party or as a volunteer.

Its claim of interest is that the Power Company owes it certain things to pay the fixed charges above referred to and to perform its contractual obligations. That makes its claim of interest under or through the Power Company, and since it claims whatever interest it now has under or through the Power Company, it is in privity with the Power Company as to subject matter in the mandamus litigation.

Where a person claims under or through another party it is in privity with that party.

**23 Cyc. 1253-1254;**

**Mehlhop vs. Ellsworth, 64 N. W. 638.**

Persons in privity with actual party bound by judgment.

**23 Cyc 1249-1253;**

**Emery vs. Fowler, 39 Me. 326;**

**Godding vs. Live Stock Co., 34 Pac. 942;**

**In Re: Baird 24 Pac. 167 and 49 Texas 243.**

Persons in privity bound by judgment, though not parties in former suit.

**Smith vs. Hornsby, et al., 70 Ga. 552.**

**PLAINTIFFS IN ERROR CONCLUDED AS TO ALL ISSUES WHICH WERE ISSUES IN THE MANDAMUS SUIT OR AS TO ALL MATTERS WHICH MIGHT HAVE BEEN PUT IN ISSUE IN THAT SUIT.**

**(CIVIL CODE OF GEORGIA 4336)**

"A decree in equity is conclusive of all defenses available to defendant, whether or not they were presented and litigated."

**23 Cyc. 1200.**

"Judgment negatives every defense, objection or exception which might or should have been raised."

**23 Cyc. 1197.**

See the following cases:

**Gunn vs. James, 120 Ga. 482 (3);**

**Greene vs. Ry. Co., 112 Ga., 859;**

**Conwell vs. Neal, 118 Ga. 624;**

**Perry vs. McLendon, 62 Ga. 598.**

The attack in this case is exactly the same as in the mandamus case, viz., that the contract of 1903 is invalid or void, and that the Act of 1907 or the proviso therein is unconstitutional and void. It is true that additional reasons are now assigned why the contract of 1903 is unenforceable and additional reasons given why the Act of 1907 or the proviso therein is unconstitutional and void. We insist that if these issues were not pleaded or raised in the mandamus case, that they could have been pleaded in that suit and that defendants are concluded by that judgment as to all issues which they might have made in that suit.

**ARTICLE 4, SECTION 2, PARAGRAPH 1, OF THE CONSTITUTION (SEE SECTION 6463 PARK'S CODE), IS NOT SELF-EXECUTING AND DOES NOT STRIKE DOWN THE CONTRACT OF 1903.**

It is contended by counsel for plaintiffs in error that the section of the Constitution above referred to is self-executing, and that since the rate on all lines of plaintiffs in error, except the main Decatur line and College Park line, has been advanced from five cents to seven cents by order of the Railroad Commission, the maximum rate on the main Decatur line under the contract of 1903 being fixed at five cents, said contract of 1903, on account of this difference in rates, has become discriminatory and is abrogated by the above constitutional provision. The test as to whether a constitutional provision is self-executing is well stated in the following language of the Court in the case of *Woolworth vs. Bowles*, 61 Kansas 569, 574, to-wit:

"As a rule, constitutional provisions, unless expressed in negative form or possessed of a negative meaning, are not self-assertive. They usually assume the form of a command to the Legislature, and the legislative action becomes necessary to give them effect."

This case is cited and followed in *Rowland vs. Forest Park Company*, 79 Kansas 134. The same doctrine is clearly announced in *Groves vs. Slaughter*, 15 Peters 449, 10 L. Ed. 800.

Here the Court passes upon the Constitution of Mississippi, which declared "that the introduction of slaves into that State, as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." This language of the Constitution would seem to be prohibitory, but the Supreme Court of the United States says not, stating that "the language of the Constitution obviously points to something more to be done and looks to some future time, not only for its fulfillment, but for the means by which it was to be accomplished." The Court says further, "there are no penalties or sanction provided in the Constitution for its due and effectual operation."

In the case of *Fusz vs. Spaunhorst*, 67 Mo. 256, the constitutional provision which made it criminal for officers of a banking institution to accept deposits after knowledge that the institution was insolvent, and further making such officers civilly liable for any loss sustained by such an act, although the word "shall" is used both in reference to criminal offense and civil liability, it was held upon a civil suit that this provision in the constitution was not self-executing, the Court saying:

"The cases are exceptional where constitutional provisions enforce themselves; ordinarily the labors of the Convention have to be supplemented by legislation before becoming operative."

In the case of *State vs. Mayor of Helliner*, 85 Pac. 744, the Court holds the constitutional provision there reviewed not self-executing, and says further:

"If the Legislature fails or refuses to enact any measure on the subject at all, then the right granted would simply lie dormant, for it must be conceded that there is no power which can coerce the Legislature into enacting a particular law."

This same rule is announced in *Groves vs. Slaughter*, *supra*. See all the following cases:

**St. Louis A. T. R. Co. vs. Fire Association**, 30 S. W. 350, 352;

**Bowie vs. Lot**, 24 L. A. Ann. 215;

**State vs. Cole, auditor**, 32 So. 314.

The general rule stated above seems to be clearly supported by the authorities cited. Testing the constitutional provision contained in 6463 of the Code by this rule, it seems to us that the conclusion must inevitably be reached that this provision of the Constitution is not self-executing. Note the language:

"The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs, are hereby conferred upon the General Assembly."

Where is the authority to do these things vested? Clearly in the Legislature, for the constitution says it is conferred upon the General Assembly (Georgia Code, Sec. 6464). Here is a plan addressed to the General Assembly calling upon it to do certain things. The section referred to then proceeds as follows—referring to the General Assembly:

"Whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discrimination on the various railroads of this State, and to prohibit said railroads from charging other than just and reasonable rates and enforce the same by adequate penalties."

The Constitution does not undertake to provide how all these things shall be done, but plainly and unmistakably calls upon the Legislature to do so and to provide for adequate penalties to enforce the statute or statutes to be enacted by the Legislature.

The Legislature undertook to carry out the provisions of this section of the Constitution when it enacted the law of 1879, creating the Railroad Commission, and doubtless thought no further legislation was necessary under this constitutional provision at that time. Since then, by the act of 1907, the Legislature has seen fit to extend the authority of the Railroad Commission over street railroads and telephone and telegraph companies, and doubtless from time to time, as they deem it advisable, and necessary, the powers of the Commission will be extended to include still other public utilities. But we shall contend and undertake to show later that this extension of power by the Railroad Commission is not under and by virtue of this constitutional provision, but by virtue of the power already vested in the Legislature under the common law which gave the Legislature full and ample power to do all that it has done without this constitutional provision. So, we submit that the section of the Constitution referred to is not self-executing, and that the contract of 1903 was not destroyed by this constitutional provision whether discriminatory or not and the proviso in the Act of August 23, 1907, by which the contract of 1903 between the Town of Decatur and defendants was preserved, was a valid legislative enactment, and that said contract was then and now is still valid and binding.

**ARTICLE 4, SECTION 2, PARAGRAPH 1, OF THE CONSTITUTION, WHETHER SELF-EXECUTING OR NOT, DOES NOT APPLY TO STREET RAILROADS.**

We submit that the language of this section of the Constitution clearly shows that the constitutional convention did not have in mind street railroads at all, but were considering merely steam railroads. Notice the language of the section referred to:

"Railroad freights and passenger tariffs," "reasonable and just rates of freight and passenger tariffs," and again, "to regulate freight and passenger tariffs."

If the language of the section itself leaves any doubt that the constitutional convention was not considering street railroads at all, this doubt will be removed by reading the debates in the convention upon this section of the Constitution, as reported by Mr. Small in his notes on "Constitutional Convention of Georgia." See pages 378, 382, 383, 410, 465-466.

The Legislature evidently put this construction upon the provision of the Constitution referred to, for it expressly excepted street railroads from the act carrying into effect this constitutional provision. See Acts of 1878-9, page 130, Section XII.

We have examined the roster of the constitutional convention, and also the House and Senate Journal of the Legislature of 1878-9, and find that a number of the delegates to the convention were also members of this Legislature that passed the enabling act under the section of the Constitution referred to. In this connection, see the statement of Justice Simmons in the case of County vs. Thompson, 83 Ga., page 270, in that portion of the opinion found on 275, as follows:

"This shows the construction placed upon these sections of the Constitution by the members of the Legislature from the adoption of the Constitution and the last session of that body; and we know of our own knowledge that there were

many able lawyers in the successive Legislatures, whose opinions on questions of this sort have great weight with us."

These men doubtless knew what was the intention of the convention in adopting this section of the Constitution, and the construction placed on this section by the Legislature only two years after the constitutional convention doubtless has great weight with this Court. See the following authorities:

**County vs. Thompson, 83 Ga. 274;**

**Fullington vs. Williams, 98 Ga. 813;**

**Hawkinsville R. Co. vs. Waycross R. Co. 114 Ga. 243.**

We, therefore, submit that the constitutional provision in question does not apply to street railroads, and that the action of the Legislature in extending the power of the Railroad Commission to include street railroads in the Act of August 23, 1907, is based upon its power under the common law.

## XX.

**IF ARTICLE 4, SECTION 2, PARAGRAPH 1, OF THE CONSTITUTION BE SELF-EXECUTING, AND IF IT APPLY TO STREET RAILROADS, IT IS ONLY DECLARATORY OF THE COMMON LAW, AND COMMON LAW PRINCIPLES MUST BE APPLIED IN DETERMINING WHETHER THE CONTRACT OF 1903 BE DISCRIMINATORY.**

(We do not think the question of discrimination is involved in this case, as there is no interstate traffic, but inasmuch as plaintiffs in error contend that the question is involved, we submit the following on that subject.) :

The Court will note that the section of the Constitution referred to directs the Legislature to prevent "unjust" discriminations and to require "reasonable and just" rates of freight and passenger tariffs, and says again that the Legislature shall pass laws to prohibit "unjust" discriminations and also to prohibit the roads from charging other than "just and reasonable" rates, etc.

From an examination of the authorities below cited, it will be seen that these are the exact terms used all through the common law when dealing with discriminations by carriers.

In the case of Bayles vs. Kansas Pacific Co., 5 L. R. A., page 480, the Court, after reviewing a number of authorities on the question of discrimination under the common law, says, at the bottom of page 483, the last column:

"In the light of these authorities, attention is now called to the provisions of the Constitution which relate to this subject. Section 6 of Article 15 declares that 'all individuals, associations and corporations shall have equal right to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State; and no railroad company nor lessee, nor employee, thereof, shall give any preference to individuals, associations or corporations in furnishing cars or locomotive power.'"

The Court then holds that this provision of the Constitution is merely declaratory of the common law. See also the following cases:

**McDuffie vs. The Portland & R. Railroad, 13 Am. R., 84 (II);**

**Concord & Portsmouth Railroad vs. Forsaith, 47 Am. R. 181;**

**State vs. Central Vermont R. R. Co., 130, Am. St. R., 1065, last head-note, 1071.**

In 10 C. J., page 473, it is said:

"At common law, only an unjust discrimination by carriers is condemned. So the constitutional and statutory provisions of the State and Federal Governments prohibiting discrimination are very generally held to prohibit only unjust discriminations."

Again, in 4 R. C. L., 576 (44), it is said:

"It has usually been considered that statutes or constitutional provisions prohibiting discrimination are merely declaratory of the common law and impose no greater obligations than the common law would have imposed without them."

Examination not only of this provision of the Constitution, but the acts of the Legislature, as embodied in the Act with reference to discrimination by carriers, discloses that it is the policy of the State to follow the common law in reference to discrimination by railroads and merely to avoid unfair rates, as is clearly shown by the provision in the Constitution which requires the Legislature to provide adequate penalties for unjust discrimination. If, then, we are correct in our position that this section of the Constitution is merely declaratory of the common law—and we submit that we are sustained in this position by the authorities, then we shall have to look to the common law to determine whether or not there is any unjust discrimination provided for under the terms of the contract of 1903.

## XXI.

### **UNDER THE COMMON LAW, WHICH WE SUBMIT CONTROLS IN GEORGIA, THE CONTRACT OF 1903, BETWEEN THE TOWN OF DECATUR AND GEORGIA RAILWAY & ELECTRIC COMPANY IS NOT UNJUSTLY DISCRIMINATORY.**

There are two lines of decision in the Courts of the United States as to what is the common law with reference to discrimination by carriers. Some courts hold that, under this law, it is the duty of carriers "receive and carry goods for all persons alike, and that the rates must not only be reasonable, but equal, when the conditions are substantially the same." Other courts hold that, under the common law, "the right of action was based upon the rate charged being unreasonable and excessive in itself, and that a mere discrimination gave no cause of action."

In the case of Cowden vs. Pacific Co., 18 L. R. A., 221 (2), 223, the Supreme Court of California considers two lines of decisions, and reaches the conclusion that the decisions of the American courts holding that equality is required under the common law was influenced by the decisions of the English courts interpreting the early English statutes modifying "the common law and that, therefore, this line of decisions is weakened to that extent." The Court then cites English cases, drawing a distinction between the common law of England and the equality statutes of England.

The leading case in the United States on this subject seems to be the case of Johnson vs. Pensacola & P. R. Co., 26 Am. R., 731, 16 Fla., 623. This case was decided in 1878 before any statute on the subject existed in Florida. After reviewing the English and American cases, the Court concludes that exact equality is not required, the true rule being stated by the Court on page 738, as follows:

"The rule is not that all shall be charged equally, but reasonably, because the common law is for the reasonable charge and not the equal charge. A statement of inequality does not make a cause of action because it is not necessarily unreasonable."

In a later case (1890), Cleveland, etc., Railroad vs. Closser, 9 L. R. A., page 754, the Supreme Court of Indiana reviews the English and American cases and reaches the same conclusion as the Florida Court, and, on page 757, says:

"The current of judicial opinion in America flows in the general channel marked out and opened by the Courts of England,"

citing many cases, and then proceeds to criticise cases holding adversely. See also *ex parte Benson*, 18 S. C., 38:

**Pittsburg R. R. vs. Gage, et al., 12 Gray, 393, 398;**

**Spoffard vs. Boston R. R., 128 Mass., 326-8;**

**State vs. Central V. R. Co., 130 Am. St. R., 1065.**

The Georgia cases support this position also. In Ocean Steamship Company vs. Savannah Supply Company, 131 Ga., 834, the Court quotes the Johnson case, *supra*, and others, stating the common law rule, and says:

"In these cases the complaining shippers were accorded by the carriers every legal right which they could lawfully exact, and their complaint was, not that the carriers were remiss in any duty to them, but that they were entitled to share in the favors extended to the other shippers."

"In the case in hand, the complaint is that the carrier denies the plaintiff a substantial legal right; that the carrier owes it a duty to accept its lumber in the order of its tender and the carrier refuses to perform this duty and is prevented from performing it by giving a preference to shippers of cotton. The gist of the complaint is not so much that favors are shown to shippers as it is that the bestowal of these favors interferes with the steamship company in discharging its duty to the plaintiff by accepting its commodity in the order of its tender.

Again, in Merchants, etc., Co. vs. Granger, 132 Ga., 171, the Court says:

"We apprehend the rule to be, as has often times been declared, that a carrier may grant favors to the shipper without being open to the charge of unjust discrimination only when the carrier, by granting the favor, does not deny to other shippers any right which they may demand under the law, and the favored shipper is not given any material advantage in competition in business."

In Wadley Southern Railway Company vs. State, 137 Ga., 509, the Court says:

"At common law, carriers were allowed to discriminate in favor of some of their patrons so long as the bestowal of the favors did not violate their duty to the public," citing Ocean Steamship Company, *supra*.

**UNDER THE AUTHORITIES ABOVE CITED, THE CONTRACT OF 1903 BETWEEN THE TOWN OF DECATUR AND THE GEORGIA RAILWAY & ELECTRIC COMPANY DOES NOT CREATE AN UNJUST DISCRIMINATION.**

It is well settled that every inequality does not create an unjust discrimination. While it is true that since the raise in rates upon all the lines of the defendant companies, except the College Park and main Decatur line, there is an apparent inequality between the five-cent rate on the main Decatur line and the seven-cent rate on other lines of the defendant companies, when the facts are considered, the inequality is only apparent and not real. We invite the Court's attention to the facts in connection with the contract of 1903, which are as follows: In the fall of 1902, there were three lines of street railway between Atlanta and Decatur, one on the south side of the Georgia Railroad, one immediately north of the Georgia Railroad, and one still farther north and practically parallel to this line. On the morning of December 29, 1902, the Electric Company, without notice to the town authorities of Decatur, commenced tearing up its track and structures on the most northerly line, in violation of law. This was stopped on the same day by an injunction secured by the town authorities. As the record shows (see recitals in contract of 1903) the officials of the Electric Company then commenced negotiations with the town authorities for an adjustment of the litigation, by which the Electric Company should be permitted to take up the line it had already started to tear up and abandon its operation. The negotiations finally resulted in the contract of 1903, which permitted the Electric Company to take up the line in question and abandon its operation, and one of the considerations for this permission was that the Electric Company and its successors should never charge more than five cents for one fare upon its main Decatur line, above referred to as the Rapid Transit line, etc. This contract was executed on the part of the Town of Decatur by the performance of all that it obligated itself to do, and the line of railway in question was taken up and the Electric Company and its successor, the Power Company, have been saved the expense of maintaining and operating this line for about eighteen years and is now enjoying exemption from this

expense and proposes to continue to enjoy the same exemption. This, we submit, is a valuable and adequate consideration to support the contract. There is no suggestion anywhere in the evidence that this consideration is not either valuable or adequate, and we dare say if the Power Company and the Electric Company were given the choice of restoring the line and operating it and then collecting seven cents or allowing the status to remain as it is, they would indefinitely prefer to collect five cents on the main Decatur line and not restore and operate this old line that was taken up. This valuable consideration distinguishes this contract from most similar contracts and creates a condition much dissimilar and unlike any condition that exists on any other part of the system of the railways of the defendants, so far as the record shows. No fact appears to show that the consideration for this contract was not reasonable or adequate, and the burden is on the defendants to show undue advantage by this contract. The law will presume the contract was founded upon a sufficient consideration.

The Court's especial attention is called to the case of *Forman vs. New Orleans & C. R. Co.*, 4 Sou. 246. In this case, the ordinances of the City of New Orleans provided that there should be a five-cent fare from Canal Street to Napoleon Avenue Station and a five-cent fare from Napoleon Avenue Station to Carrollton, making the through trip from Canal Street to Carrollton cost the passenger ten cents, but provided that residents living above Napoleon Avenue should have the privilege of purchasing through tickets at the rate of ten for fifty cents, thus giving the residents above Napoleon Avenue the privilege of riding from Carrollton to Canal Street and from Canal Street to Carrollton for five cents. This privilege was not accorded to the general public, but only to residents above Napoleon Avenue. This ordinance was attacked as creating an unjust discrimination, and was upheld by the Court, the Court stating that it was proper for the residents above Napoleon Avenue to have the privilege of riding to their business at the center of the City on Canal Street for five cents. In this connection, while it is not suggested in the decision, we wish to suggest to the Court that much is being said and written at the present time by writers on the development and progress of cities and towns as to the necessity of giving low fares from the center of the city to the suburbs, in order

to prevent the congestion of residences in the center of the city, thus encouraging people to move to the suburbs and promoting morality and health.

In the New Orleans case, the Constitution of the State of Louisiana gave the cities control of their streets, but there is no specific authority in the language of the Constitution authorizing the cities of the State to fix the fares of street railroads, and yet in this decision the Supreme Court of Louisiana holds that, under the power that the cities have over their streets, they have full power and authority to make ordinances and contracts fixing the fares of street railroads.

In the contract between the defendants and the Town of Decatur, it will be observed that the general public has the same right to ride on the main Decatur line for a five-cent fare as have the citizens of the Town of Decatur, whereas in the New Orleans case only the residents living above Napoleon Avenue were awarded this privilege, and yet the contract was upheld by the Supreme Court of Louisiana as not creating unjust discrimination. In the case of Robira vs. New Orleans Co., 14 So., 214, the Forman case, *supra*, is cited and followed. The decisions abound with instances where inequalities exist, and yet they hold that no unjust discrimination is created. See the following cases:

**Root vs. Long Island Railroad Co., 4 L. R. A., 331** (a case where a shipper was given a rebate regularly in consideration of his erecting a dock which was used jointly by the railroad and the shipper);

**Hoover vs. Penn. Railroad Company, 22 L. R. A., 263** (a case where a manufacturer was given a special rate on a shipment of coal in consideration that it would route all of its manufactured goods over the line of the defendant railroad company);

**Bayles vs. Kansas Pacific Railroad Co., 5 L. R. A., 480.**

Especial attention is invited to this latter case, in which the first head-note is as follows:

"Mere inequality between the rate charged a shipper by a railroad company for transporting goods and the company's published tariff rates is not prohibited either by the common law or by the provision in Section 6, Article 15 of the Constitution, that 'no undue or unreasonable discrimination shall be made in charges'; hence a contract to transport a certain shipper's goods at less than regular tariff rates is valid, unless it be shown that an unjust discrimination was thereby made or intended."

**Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co.**, 145 U. S., 263, 36 L. Ed. 699, 705 (which deals with a party-rate ticket and holds that giving a special rate for such a ticket is not a rebate);

**Little Rock & M. R. Co. vs. St. Louis & S. R. Co.**, 26 L. R. A., 192 (which holds that a requirement that freight shall be prepaid by a connecting carrier, without requiring the same of other shippers, is not an unjust discrimination);

**Gamble-Robinson Company vs. Chicago & N. R. Co.**, 21 L. R. A. (N.S.), 982 (which case is also on the question of prepayment of freight and holds that such a requirement is not an unjust discrimination, although the purpose of the requirement of the prepayment of the freight is to injure the business of a consignee or harass it).

To the same effect, see the following cases:

**Oregon Short Line vs. Northern P. R. Co.**, 61 Fed., 158;  
**Interstate Commerce Commission vs. Alabama M. R. Co.**, 168;

**U. S.**, 144, 42 L. Ed. 414 (2), where the question of competition as justifying a different rate is dealt with.

See also:

**10 C. J., 493 (b),** where the same subject is dealt with.

Again, on the same point, see:

**Lough vs. Outerbridge,** 25 L. R. A., 674, where it is held that a special rate given to the shipper by the master of a vessel in port, while a rival vessel was in port loading, was not an unjust discrimination against other shippers who did not agree to give all of their tonnage to one vessel.

See also, on the question of competition:

**Interstate Commerce Commission vs. Chicago G. W. R. Co.,** 209 U. S., 108 (5), 52 Law Ed., 705.

The exclusive business of a shipper is held to be a sufficient consideration to support a special rate in **State vs. Central Vermont R. Co.,** 130 Am. St. R., 1065. See:

**4 R. C. L., 583, 4, as to special rates for return and commutation tickets;**

**4 R. C. L., 600, spur tracks;**

**4 R. C. L., 601 (75), shipper providing cars;**

**Cleveland, Columbus & C. I. R. Co. vs. Closser,** 9 L. R. A., 754, granting rebates;

**Ex parte Benson,** 44 Am. R., 564; 18 S. C., 38;

**Concord & Portsmouth R. vs. Forsaith,** 47 Am. St. R., 181, where lower rate is given for large quantity than for small quantity;

**4 R. C. L., 579 (47), long and short haul clause;**

**Interstate Commerce Commission vs. Detroit, etc., R. Co.,** 167 U. S., 633, 42 L. Ed. 306, where it is held that furnishing free cartage on delivery of goods at one town but not at another, for which the same rates are charged for shorter haul is not equivalent to charging a greater

**compensation for a shorter distance in violation of Section 4 of the Act to Regulate Commerce, etc.**

In the case of Murphy vs. Worcester Consol. Street Railway Company, 199 Mass., 279, 85 N. E., 507, it is held that requiring a street railway company to carry school children at a reduced rate is not unjust discrimination.

In 122 N. W., 1023, it is held that a telephone company may furnish free telephones to a city without being guilty of unjust discrimination.

**XXIII.**

**THE CONTRACT OF 1903 IS NOT THEREFORE UNJUSTLY DISCRIMINATORY FOR THE FOLLOWING REASONS:**

(a) At the time this contract was made, in 1903, the rate on all lines of defendant companies was five cents. There was no inequality of rate then. The rate on all lines in the year 1907, when the Act of August 23, 1907, was passed, was five cents. There was no inequality of rate at that time.

The common law prohibited only unjust discrimination. Our Constitutional provision, Code 6463, and our statutes are only declaratory of the common law.

The Courts, in passing upon the question, hold there is no "unjust" discrimination where the rate fixed by contract is founded upon an adequate or reasonable consideration. It is, for instance, not every advantage in a rate given to shippers which is condemned, but only the undue advantage which injures the business of the shipper. See the authorities cited in this brief. The rule is stated in 4 R. C. L., 603, Sec. 74, as follows:

"But the matter is, under the general rule of law, largely one of fact, and where it appears that the consideration given for a special preference or rebate is a bona fide contract, although allowing a discriminating rebate, cannot be determined to be, as a matter of law, invalid, for when the

consideration paid for reduced rates by a favored shipper is obviously equal to a discount allowed him, there is in fact no discrimination and the contract is not obnoxious to the law."

Decatur gave consideration for this contract, as shown by the facts in the record, and, as already stated, the people who ride on other lines of the defendant companies get the benefit of this contract.

(b) All contracts must be construed as of the date when executed and under the circumstances existing at that time. It is not contended that this contract was discriminatory in 1903 when the contract was made, or on August 23, 1907. It is conceded that the rates on all lines up to these dates and up to the year 1919 was five cents.

What is an undue and unreasonable advantage is a question not of law but of fact. It is not shown by the defendant companies that the consideration for this contract was not reasonable or adequate. See:

**Roote vs. Long Island R. Co., 4 L. R. A., 331;**

**Concord & Portsmouth R. Co. vs. Forsaith, last paragraph,  
47 Am. R., 182; 130 Am. St. R., 1071;**

**10 C. J., 508;**

**Interstate Commerce Commission vs. Alabama & M. R.  
Co., 168 U. S., 144 (4);**

Under the undisputed facts in this case there is a valuable and adequate consideration to support the contract.

In *City of Superior vs. Douglas Co. Tel. Co.*, 141 Wis., 363, 122 N. W., 1023, the Court says:

"A contract binding a telephone company operating in a city to maintain telephones in the public offices in the city building and in public library building without cost to the city, entered into at a time there was no statute prohibiting

the company from granting the city a different rate for service than general customers, is not invalid because creating an unjust discrimination.

"In the absence of any statute on the subject, a public service corporation may make a different rate to one person than to another, or accept pay from one on a money rate and from another in service of a legitimate character, or some other reasonable equivalent, so long as the compensation demanded is within reason under the circumstances, for only unjust discriminations are condemned at common law.

"The validity of a contract, sanctioned by public policy when made, is not affected by a change in public policy by legislative act or otherwise.

"Public policy as bearing on the judicial enforceability of contracts is that principle which maintains that a person cannot rightfully do or bind himself to do that which is inimical to the public good, and hence a contractual situation not clearly within the principle condemning it cannot be said to be illegitimate merely because there is discrimination.

"Discriminatory contracts between public utility corporations and their patrons which are void as inimical to the public good are void because unreasonable advantage is thereby given to one customer or a class over others, as all have a moral and legal right to equality of treatment.

"A contract between a public utility corporation and the State or a public corporation which gives the State or public corporation advantage over general customers inures to the benefit of the State or public corporation in the aggregate, and is not discriminatory, and is not violative of public policy.

"A contract binding a telephone company operating in a city to maintain, without charge, telephones in the public offices of the city, is not invalid as contrary to public policy, for the advantage is to the public."

(c) The five-cent rate given on the North Decatur line is a provision in favor of the general public and is not therefore an unjust discrimination and is not confined to the citizens of Decatur, and therefore is not an unjust discrimination, and is therefore not against public policy.

In *City of Belfast vs. Belfast Water Company*, 115 Me., 234, 98 Atl., 738, the Court says:

"8. At common law, a contract to supply a city with water for a certain rental for the period of 20 years, and thereafter the supply to be free, is not illegal as a discrimination by a public utility; the permanent supply having been paid for in 20 installments instead of annually."

"9. At common law, a contract for free supply of water to a municipality is not illegal as discriminating against other users, being a discrimination in favor of the city, and therefore discrimination in favor of the public and not contrary to public policy."

See also:

**Banks vs. Matthews**, 98 U. S., 629;

**N. Y. Telephone Co. vs. Cooper**, 69 N. E., 109;

**Superior vs. Dayton County Tel. Co.**, 122 N. W., 1023;

**Wilcox vs. Consolidated Gas Co.**, 212 U. S., 19, 29 Sup. Ct., 192, 53 L. Ed. 382, 48 L. R. A. (N. S.) 1134;

**Interstate Commerce Commission vs. B. & O. R. R. Co.**, 145 U. S., 278, 12 Sup. Co. 844, 36 L. Ed. 699;

**Waterworks Co. vs. School Dist. No. 7 of Kansas City (C. C.)**, 48 Fed. 523;

**Dempsey vs. N. Y. Central, etc., Ry. Co.**, 146 N. Y., 290, 40 N. E. 867;

**Wyman on Public Service Corp.**, Sec. 1304.

The general public gets the benefit of this rate. Any person no matter who he is, rich or poor, white or colored, no matter where he resides, if he travels over this line to Decatur from

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Atlanta or vice versa, gets the benefit of this rate. It is not confined to the citizens of Decatur; it is for the public generally

(d) The Legislature is the final arbiter of what is sound public policy. The Legislature, by this proviso in the Act of August 23, 1907, has indicated that it is the public policy of the State to preserve to the public those contracts made by cities and towns with street railroads fixing rates. The Legislature doubtless recognized the principle supported by the authorities already given that, where a contract is made with a municipality for the benefit of the general public, it stands upon a different basis from contracts with private individuals and is not, therefore, an unjust discrimination and not against public policy. Hence they did not include in this proviso in the Act of 1907 contracts made with private individuals.

This is the declared public policy of the State. It will not be presumed that the Legislature intended to do a thing forbidden by the Constitution. This legislative determination of public policy in respect to those contracts is binding upon the Courts and must be accepted by the Courts.

In Ottumwa Ry. & Light Co. vs. City of Ottumwa, et al., 173 N. W. 270, the Court said:

"3. The Legislature is the custodian and the final arbiter of what is sound public policy, and has the power to declare what has been condemned as against public policy shall be the policy of the State; its enactment being in itself sound public policy."

**City of Belfast vs. Belfast Water Co., 115 Me. 234, 98 Atl. 738.**

(e) Neither the defendant companies nor the Railroad Commission will be permitted to do indirectly what they cannot do directly; that is, strike down a solemn contract with a municipality which the Legislature of the State has said shall be preserved.

It is claimed by the defendant companies that, since the rate has been raised by the Commission on other lines, this contract

with Decatur, fixing a rate of five cents, is an unjust discrimination against the public—that it is a legal wrong.

It appears, however, from the record, that this increase was brought about by the application of the Power Company. It was done by the Commission at the instance and request of the Power Company. It was the Power Company which brought about the increase. It is boldly asserted by the defendant companies that, notwithstanding the increase was brought about upon their application, at their instance and request, that the inequality thus made creates a discrimination which annuls their contract with the Town of Decatur.

If such a proposition were not boldly asserted, we could hardly believe that a good lawyer would insist on it. We are certain that no man with any respect for his contracts would claim it. It is on the face of it so unconscionably wrong that we are certain no Court would enforce it.

It is a familiar rule and an old maxim of the law that no person will be permitted to take advantage of his own wrong.

The position of the Power Company in the instant case is illustrated by the story of the woman who came to a lawyer to employ him to obtain a divorce for her. The lawyer asked her what grounds she had for a divorce. "Huh, I can prove that my husband wasn't the father of my last child," she said.

The companies seek a divorce from a solemn contract upon the ground that they, the companies, have raped the law or have gotten the Commission to do it.

The companies cannot break their contract of 1903 directly. Will they be permitted to do so indirectly by bringing about, through the Commission, an increase in rates on other lines and then be heard to say that their contract with Decatur is no longer valid because it is now discriminatory? If their act in thus bringing about an increase on other lines could be said to bring about an unjust discrimination, the law would not permit them to take advantage of their own wrong.

We have clearly shown there can be no unjust discrimination when a rate is fixed by a contract based upon a reasonable consideration, as the contract with Decatur is.

We have clearly shown there can be no unjust discrimination when the contract fixing a rate is made with a municipality for the benefit of the general public; that such a contract is not against public policy as being unjustly discriminatory.

The Legislature of Georgia has indicated that such a contract is not against public policy by a legislative act which preserves such a contract.

It is not within the power of the Railroad Commission, by any direct act, to annul this contract, because it has no jurisdiction over this contract.

Will these companies, by an order obtained from the Commission, be permitted to do that indirectly, that is, strike down a solemn contract, which neither the companies nor the Commission can do directly? If so, then the companies, acting through the Commission, can indirectly strike down a contract which the Legislature of Georgia, the sovereign power of the State, has said shall be preserved—shall not be stricken down! In that event, the companies and the Commission become a law unto themselves—superior to the sovereign power of the State. The creatures of the State are greater than the creator! We think that no Court will ever hold that any such can be done.

(f) The defendants are estopped from raising this question of discrimination.

In *People ex rel. Jackson vs. Suburban R. Co.*, 178 Ill., 594, 53 N. E. 349, it is said:

"An ordinance of R. authorizing defendant to enter and use its streets for the operation of a street suburban railroad to Chicago, provided that the fare between any point in R. and the City of Chicago should not exceed the fare charged from any point in the town of C., etc., to the same point,

or return. Held that, by the acceptance of the ordinance, defendant was estopped to deny that the exaction of a greater sum from R. to Chicago than from C. was an unreasonable and unjust discrimination against the public."

In *Murphy vs. Worcester Consol. St. Ry. Co.*, 199 Mass., 279, 85 N. E. 507, the Court says:

"5. Pub. St. 1882, C. 113, Sec. 43, provides for the fixing of fares by the directors of a street railway, section 44 provides that on certain applications the Board of Railroad Commissioners shall revise and regulate fares, etc., and section 45 provides that nothing in the two preceding sections shall authorize a company or the board to raise the fare above the rate established 'for a locality,' by agreement made as a condition of location or otherwise, except by mutual agreement with the local authorities. St. 1898, p. 743, c. 578, Sec. 13, in force October 1, 1898, in effect withdrew the right of municipal officers to impose conditions regulating and restricting fares, but confirmed prior locations and continued them, subject to regulations or conditions in force. Held that, in view of the statutes, the municipal officers, granting a location under which a street railway was organized, prior to October, 1898, could impose restrictions as to fares not unlawful in themselves, and the reasonableness thereof could not be thereafter questioned by a street railway company organized on the basis of such location and restriction.

"6. By Pub. St. of 1882, Sections 43-45, the Legislature intended to give the Board of Railroad Commissioners power to regulate fares charged by street railway companies, whether or not fixed in accordance with restrictions imposed by municipal officers, subject to the condition that fares so established for a municipality should not be raised, except by mutual agreement with such officials; and even if the fares between a city granting a location and another city in the State was not established for locality, within the meaning of the statute, a street railway company cannot complain of the fares fixed in granting a location, when no attempt has been made to have the fares revised by the Railroad Commissioners.

"8. Where the reasonableness of restrictions imposed in granting a location to a street railway are questioned in an action, only their validity at the time they were originally imposed is to be considered.

Page 511. "And it may be added that we do not understand it to be contended that this restriction created any undue burden upon the street railway company when it was first imposed. Neither the defendant's answer for the agreed facts go further than to state that the charge of half rates yields at present less than the cost of carriage, by reason of the increase in the last six years of the cost of maintaining and operating the defendant's railway. But we can pass only upon the validity of the restriction as originally imposed and assented to by the defendant's predecessor in title and voluntarily assumed by the defendant."

Page 512. "Accordingly, a mandatory injunction should be issued requiring the defendant to provide to pupils in attendance upon the Worcester Normal School transportation between Clinton and said school, at one-half the regular fare while going to and from school. So ordered."

Pages 508-509. "This is a bill in equity brought by the selectmen of the Town of Clinton to compel the defendant to carry pupils in the Worcester Normal School, in Holy Cross College, in the Worcester Business Institute, and in other schools in the City of Worcester, between Clinton and these schools, at one-half of the regular fare charged to other passengers. The defendant has succeeded to the property, franchises, liabilities and obligations of the Worcester & Clinton Street Railway Company, through a conveyance from this corporation to the Leominster & Clinton Street Railway Company, and another conveyance from the last-named corporation to the defendant. In the grant of location from the selectmen of Clinton to the Worcester & Clinton Street Railway Company, which was accepted by that company on November 9, 1897, is this provision: Said company further agrees to provide to pupils in attendance upon the public schools, the State Normal School of Worcester or any school in Worcester, transportation to such pupils at half price while going to and from school."

"The main question in this case is as to the validity of this restriction. The defendant contends that its requirement is invalid and unconstitutional, that it creates an arbitrary and unreasonable discrimination between different classes, of the traveling public, in violation of articles 6 and 7 of the Declaration of Rights in our State Constitution; and that it violates the provisions of the Fourteenth Amendment to the Constitution of the United States in that its effect is to deny to the defendant equal protection of the laws and to deprive it of its property without due process of law and without just compensation. *Lake Shore & Michigan Southern Railway vs. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. But it first must be considered whether the defendant is entitled to raise this question."

See also:

**Oregon Short Line vs. Northern Pacific R. Co., 61 Fed. 158 (1).**

It is only where the discrimination inures to the advantage of one man in consequence of some injustice inflicted on another that the law interferes for the protection of the latter.

**Boerth vs. Detroit City Gas Co., 152 Mich. 654, 116 N. W. 628.**

Intervenors are not in court complaining that the rate paid by them is too high. They do not complain of any injustice done them. Hence there can be no unjust discrimination against them. The companies are not complaining of the rate being too high. Hence there is no one in court of the defendants complaining of the seven-cent rate. The substance of their complaint is, that the persons who use the North Decatur line should be required to pay seven cents instead of five, although a raise in the rate of the North Decatur line would not enure to the benefit of the defendant intervenors, but can only result in detriment to the general public who use the North Decatur line.

**THE INTERVENORS, HACKMEN, ET AL. TAKE THE CASE AS THEY FIND IT. THEY CAN CLAIM NO OTHER OR GREATER RIGHTS THAN THE DEFENDANT COMPANIES. THE GRANT OF AN INJUNCTION BEING PROPER AGAINST DEFENDANT COMPANIES IS THEREFORE PROPER AS TO INTERVENORS.**

Intervenors must stand or fall upon such defenses, and such only as defendant companies may be able to make in the instant case, they cannot raise new issues or other and outside issues which defendant companies cannot make or raise. They are estopped in the same way that defendant companies are estopped, as indicated by the authorities cited in this brief.

**Railway Company vs. Pope, 122 Ga. 577 (1);**

**McGaskill vs. Bower, 126 Ga. 342, 343;**

**Booth vs. State, 131 Ga. 750 (4);**

**Worsham vs. Ligon, 147 Ga. 39 (1) and (2);**

**Seaboard Ry. vs. Knickerbocker Trust Co., 125 Ga. 463;**

**Atlanta, etc., Ry. vs. Carolina, etc., Cement Co., 140 Ga. 650.**

Special attention is called to the plea to the intervention and to the demurrer to the intervention. The demurrer to the intervention sets forth good reason in law and equity why the intervenors should not be made parties defendant, or, if made parties, are bound by whatever judgment may be rendered in the case against defendant companies. While the trial court could not pass upon this demurrer, the court had the right to consider this demurrer, and doubtless did consider it. The argument made herein and the authorities cited in this brief will apply to the intervenors, and we invoke the principal of law as stated in this brief as to said intervenors.

The intervenors made no complaint to the Commission and no objection before the Commission to the raising of these rates, and it does not appear that they now make any such objection.

and they should not now be heard to complain of any difference in rates.

It does not appear for whom they are appearing. If intervenors are appearing as representatives of defendant companies and are asking for an increase in rates for and on behalf of defendant companies, they have no standing in court for this purpose, and cannot be made parties. If their interest is adverse to that of defendant companies, they have no standing in court, and cannot be made parties.

The intervenors are strangers to the pending cause, and it is not shown that it is necessary to their protection that they be allowed to become parties in this case. If they have any right in law or equity to attack said contract of 1903 with the Town of Decatur as invalid or unenforceable, they must proceed in a separate suit for that purpose.

"Where a bill contains no allegations connecting third persons with the subject matter of the litigation, complainant cannot be compelled on application to make him a defendant to the bill, and he should not be made a party."

**Doke vs. Williams, 34 So. 569 (1).**

"A stranger cannot be admitted as a party to a pending suit as complainant or defendant without complainants consent \* \* \* especially where petitioners intervention could raise new issues."

**Shepard vs. Light Co., 74 Atl. 141 (3).**

"A party cannot stand as the representative of others to whom his own interests are hostile and adverse."

**Beecher vs. Foster, 42 S. E. 647 (3).**

"It is not the right of a stranger to a pending cause to intervene therein, unless it is necessary to his protection that he be allowed to become a party to the litigation, and this affords an opportunity to resist the rendition of a judgment which would operate to his prejudice."

**Clarke vs. Wheatley, 113 Ga. 1074.**

"They have no right to be made parties over objection of complainant."

20 R. C. L., page 683.

"General rule is a stranger will not be permitted on his own application to become a party."

16 Cyc. 201.

It further appears as shown by the plea to the intervention that the City of Atlanta has a contract with the Electric Company, whereby the Electric Company agreed, as part consideration for said franchise, to pay each year a certain per cent of its gross income to the City of Atlanta as a franchise tax; that this franchise contract also provides for free transfers and also requires the Electric Company to pay the full amount of the cost of paving 15 feet of those streets where there are double tracks of railway and 11 feet where there are single tracks, and the paving is done under the assessment plan.

Certain of these intervenors, it appears, reside in the City of Atlanta. They come into court for the purpose of striking down the rights of the Town of Decatur in the franchise contract which they say discriminates against them or the city or locality in which they reside, and they hold to their bosoms franchise contracts just as amenable to attack on the same grounds, and yet they show no effort to surrender their contracts.

They come into this court, therefore, with unclean hands, with admittedly unclean hands, and are, therefore, without equity.

It further appears that the constituted authorities of said localities and cities do not see fit officially to intervene in this cause for the purpose of attacking the franchise with the Town of Decatur on the ground that the same discriminates against their city or locality.

For that reason, the intervenors have no standing in court, because they and each of them are powerless to do equity in the premises.

Moreover, the intervenors can invoke no Federal question in this Court. They are not parties to the contract and own no interest in the companies. Hence they have no contract or property rights which have been invaded and the clauses of the Federal Constitution invoked by the companies have no application to the intervenors. If they complain of anything, it is only of discrimination and that is not a Federal question in this case.

## XXV.

**NO ALLEGATIONS BY PLAINTIFFS IN ERROR TO SHOW  
VALUE TO THEM OF ABANDONMENT OF ATLANTA RAIL-  
WAY LINE.**

Attention is called to the fact that the Electric Company, by the permission of the Town of Decatur, to take up and abandon the operation of the Atlanta Railway Company line, has for twenty years saved the expense of operating and maintaining this line, but it does not anywhere in its pleading allege what it has saved during these twenty years by the abandonment of this line, nor does it allege what it is now saving, and there is no way for the Court to determine what was and still is the value of this concession made by the Town of Decatur to the Electric Company. This value bears directly on the five cents rate and the Court cannot determine whether the rate is compensatory or not until informed what is the value of this continuing concession. Regardless of the validity of the contract of 1903, the plaintiffs have failed to allege facts sufficient to show that the rate is non-compensatory.

**Franklin Telegraph Co. vs. Harrison, 145 U. S. 459, 36  
L. Ed., 776, and see opinion p. 779 L. Ed., as to value of  
right surrendered.**

THE CASES CITED IN THE BRIEF OF PLAINTIFFS IN ERROR ARE EITHER NOT PERTINENT OR MAY BE DISTINGUISHED UPON THE FACTS FROM THE INSTANT CASE AS WE THINK THIS COURT WILL SEE UPON EXAMINATION OF THESE CASES.

The legal principles involved in this case, we think, are covered by the authorities cited in our brief, and sustain our contentions.

The agreement of 1903 is a contract, not a regulatory ordinance, and does not purport to surrender the power of the State to regulate rates.

In this respect it differs from the cases cited in plaintiffs in error's brief, pages 26 and 27, such as the San Antonio case, 255 U. S. 547 and Home Telephone Co. case, 211 U. S. 265, and other similar cases cited by plaintiffs in error.

The cases from Georgia such as Americus Railway and Light Co. case, 136 Ga. 25, and Horkan case, 136 Ga., 561, cited in brief of plaintiffs in error, pages 25 and 27, have no application. Under the Georgia Constitution (Sec. 6563) cities cannot incur debts and bind subsequent councils for longer than one year without the preliminary sanction of a popular vote. Those cases deal with that question and clearly have no place in this brief.

In *So. Iowa Electric Co. vs. Chariton*, 255 U. S. 539, the statute of Iowa gives cities power to regulate rates but "forbids any abridgement of the power by ordinance resolution or contract." Hence the power to contract is expressly forbidden. *Central Power Co. vs. City of Kearney*, 274 Federal 253, is another case like the Chariton case. The cases cited by plaintiffs in error, pages 26 and 27, are distinguished from the instant case in that in those cases either there was no contract but only a regulatory ordinance, as in the San Antonio case, or else there were express statutory provisions giving the power to regulate, but expressly forbidding the making of a contract as to rates.

In the cases like *City and County of Denver vs. Stenger*, 277 Federal 865 and other cases like it, pages 28 and 29 of brief of

plaintiffs in error, there existed the dominant power to regulate and the ordinances in question were not contractual in form but regulatory in form, hence the courts construed them as regulatory only rather than contractual; and this interpretation was also adopted because to construe them as contracts would bring them in conflict with Constitutional provisions of the State. They rest upon the same principles as the San Antonio case, that where the dominant power to regulate exists an ordinance not contractual in form will be referred to an exercise of the regulatory rate-making power, rather than the power to contract. Especially is this true if the interpretation as a contract would bind the State to something it could not revoke and therefore bring the contractual interpretation in conflict with a provision of the State Constitution prohibiting the granting of irrevocable special privileges and franchises.

The cases cited, page 30 of plaintiffs in error's brief, such as Wyandotte Gas Co. vs. Kansas, 231 U. S. 622, have no application and throw no light upon the questions in this case.

The Georgia Constitutional provision referred to (Code 6463), simply confers upon the General Assembly the power of regulating passenger tariffs, etc. It is recognized that this power is lodged in the Legislature, and that at any time it can take it over by placing the North Decatur line under the jurisdiction of the Railroad Commission of Georgia as to fixing of fares thereon. But until it does so the contract between the parties must stand.

In the Tampa case the Legislature gave the cities and towns of Florida the power to fix rates, but said by the same Act that this should not impair any valid contract.

This Court said in that case: *This it had the right to do. It was not bound to exercise the whole power vested in it by the Constitution, but might grant so much of such power to the corporate authorities as it deemed best for the public interests."*

**Tampa Waterworks vs. Tampa, 199 U. S. 246.**

This is not such a contract as can be terminated upon notice by either party. The cases cited by plaintiffs in error such as Bearden Merc. Co. vs. Madison Oil Co., 128 Ga. 703, and Risley vs. City of Utica, 179 Federal 875, cited on pages 32 and 33 of brief of plaintiffs in error, have no application to the instant case. They are contracts for the sale of articles. The Bearden case is a contract for sale of hulls where one party agrees to deliver and the other agrees to take at a certain price. The Risley case is one for the sale of water to a city where the city agrees to take the water at a certain price as long as the Company furnished it. The courts have held that contracts of sale can be terminated where no time limit is specified. In such cases no harm is done either party. One gets the articles sold and the other gets his pay for them.

In the other cases cited, such as the Marshal case, 136 U. S. 393, the court permitted the removal of the shops upon the ground that there had been substantial compliance with the contract by the shops remaining there quite a number of years, construing this as a compliance with the word "permanent" used in the contract.

But the contract in controversy is quite a different matter. Decatur cannot by notice annul the franchises granted to the Company. One of these was permission to take up from the streets of Decatur another railway line which extended from Decatur to Atlanta, and to cease its operation. This can not be restored. Another grant was the right to double track on the streets of Decatur. This the Company has done and now enjoys that franchise. Decatur cannot terminate that franchise. If Decatur is bound then the Company is bound. See authorities cited in this brief on this question.

The authorities cited, pages 33 to 39 of brief of plaintiffs in error, do not sustain the propositions stated in the brief, as will clearly be seen by examination of these authorities, without attempting to discuss the cases cited.

They are mainly cases involving a conflict between intra state and interstate rates and the authority of Congress to control in-

terstate rates and in the exercise of this power to nullify an intra state rate where it interferes with interstate commerce: as

**Houston, etc., Railroad Co. vs. United States**, 234 U. S. 342,  
**American Railway Express Co. vs. South Dakota**, 244 U. S. 617;

or the validity of rates fixed by statute or by a Railroad Commission under State authority on common carriers, as

**Smyth vs. Ames**, 169 U. S. 466.

**Chicago Railway Co. vs. Minn.** 134 U. S. 418.

**Vandalia Railway Co. vs. Schnull**, 255 U. S. 113,

which can have no application to the instant case where the rate is fixed by agreement between the parties.

The cases cited by plaintiffs in error in their brief, pages 41 to 46, are all easily distinguished from the instant case. In the first place they involve statutes of the State, not contracts. And they further involve a discrimination between one corporation and other like corporations doing the same character of business, such as the Stock Yards case of

**Cotting vs. Goddard**, 183 U. S. 79;  
or such an unreasonable classification as imposing an attorney's fee and costs upon railway corporations without applying the same to other corporations and individuals, as in

**Gulf, etc., Railway Co. vs. Ellis**, 165 U. S. 150.  
and the case of

**Producers Trans. Co. vs. Railroad Commission of California**, 251 U. S. 228, which

involved the jurisdiction of the State Commission over pipe lines where the Commission had jurisdiction, without any exception as to contracts, as in the instant case.

The Act of Legislature attacked in Leonard vs. Am. Life & Annuity Co., 139 Ga. 274, made an arbitrary distinction between certain life insurance companies, that is an arbitrary discrimination between corporations doing the same business, and clearly has no application to the case at bar.

None of these cases on the subject of classification touch the instant case.

We call attention to this fact further that there was no assignment of error to the Supreme Court of Georgia based on the Act of 1907 as amended by the Act of August 18, 1919, so that the later Act cannot be considered by this Court.

See page 43 of plaintiffs in error's brief and assignments of error to Supreme Court of Georgia (Transcript pages 31 to 38).

Hence this Act of August 18, 1919, cannot be considered by this Court in determining this question of classification.

In other words, the assignment of error to this Court on this question has been enlarged and no such question of law was presented to the Supreme Court of Georgia.

But the Act of 1907 as thus amended with its proviso, was within the power of the Legislature of Georgia, and makes a classification which is reasonable and right. Furthermore, the plaintiffs in error cannot complain thereof since the Act of 1907 simply preserves to them as well as to the municipality a contract voluntarily entered into by them in order to secure certain concessions and franchises from the Town of Decatur.

**Arkansas Natural Gas Co. vs. Arkansas Railroad Commission et al. Decided March 19, 1923, No. 500, Supreme Court of U. S. and cases there cited.**

In reference to the contention of plaintiffs in error that a non-discriminatory contract may become a discriminatory contract, the cases cited in the brief of plaintiffs in error show that wherever this has been held it was because of a legislative enactment which by its terms rendered the contract illegal, or by an act of

a Commission which had jurisdiction over the very matter with which the contract attempted to deal, as in the case of

**Union Dry Goods vs. Georgia Public Service Corporation,  
142 Ga., 841, cited by plaintiffs in error.**

There the Commission had jurisdiction over light and power rates, with which the contract attempted to deal, and there was no proviso as in the Act of 1907, preserving or excepting the contract.

The instant case can be easily distinguished from the cases cited in the brief of plaintiffs in error, in that in the instant case the Commission had no jurisdiction over this contract, and there is no constitutional provision and no legislative act, which makes this contract illegal. To the contrary, the only legislative act dealing with the matter, instead of illegalizing the contract, preserves it or legalizes it.

It is said in the brief of plaintiffs in error that the fixing of the rate by the Commission is the act of the Legislature. In reply to that, we say that the very act which gave the Commission the power to fix rates on street railways also says that this contract shall not be thereby impaired. If, therefore, you give effect to the proviso in the Act of 1907, and you must do so until it is repealed, no act of an agent acting under authority of that very enactment of the General Assembly, can have the effect of repealing it or any portion of it. If so, you must assert the absurd proposition that the Commission can repeal or abrogate a legislative act. The Commission takes its delegated authority, cum onere, with the limitation that the Commission cannot impair this contract of 1903 in exerting the power which the Legislature gives it.

No case is cited by plaintiffs in error, and none can be cited, where the Court has ever held that the act of a commission may fly in the face of and strike down a portion of the self-same act from which it gets its authority. If the reasoning of plaintiffs in error is carried to its logical conclusion, then its effect is that the Commission may destroy or repeal the proviso in the Act of 1907.

We confidently expect that these companies will be made to abide by their contract with the Town of Decatur. Contracts are sacred. It is the duty of the Courts to enforce them, whether made with individuals or with corporations. No matter how great corporations may become, they are not above the law, and the sanctity of contracts with them should be preserved as rigidly as with private individuals, especially so, when the people of the State, speaking through their representatives, have said that such contracts *shall not be impaired*.

Respectfully submitted,

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October Term 1922

No. 463

GEORGIA RAILWAY AND POWER COMPANY et al.,  
Plaintiffs in Error and Petitioners in Certiorari,

vs.

THE TOWN OF DECATUR, Defendants in Error and Respondents in Certiorari.

FROM THE SUPREME COURT OF THE  
STATE OF GEORGIA.

Brief for Plaintiffs in Error and Petitioners in Certiorari.

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Petitioners in Certiorari.

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# In the Supreme Court of the United States

GEORGIA RAILWAY & POWER COMPANY,  
GEORGIA RAILWAY & ELECTRIC COMPANY,

R. C. Hackman, C. H. Knox, G. R. MacNamara,  
J. T. Braswell, C. A. Virgin, J. D. Malsby, C.  
M. Binder, J. L. Murphy, J. R. Hardin, H. M.  
Ashe, P. E. Davis, C. E. Bennett, W. E. Field,  
H. E. Hawn, David Hawn, F. McDonald, Jr.,  
and J. C. Gorman,

Plaintiffs in error  
and

Petitioners in Certiorari  
vs.

No. 463

October  
Term  
1922.

TOWN OF DECATUR,

Defendant in Error,

and

Respondent in Certiorari

## STATEMENT OF THE CASE

Town of Decatur (hereinafter called the municipality) brought an equitable petition against the Georgia Railway & Power Company (hereinafter called the Power Company) individually and as lessor of the Georgia Railway & Electric Company (hereinafter called the Electric Company).

The case was based upon a claimed contract which, plaintiff contends, fixes a 5 cents rate of fare, and that such claimed contract, together with subsequent Legislative acts, requires the operating street railway company to transport passengers boarding or alighting from cars, on the North Decatur line, within the present limits of the Town of Decatur, to and from Atlanta, with the right to demand and receive transfers whereby such passengers may ride over all the lines of the street railway company, for a 5 cents fare; although, under the rates fixed by the Railroad Commission

of Georgia, all the other passengers are required to pay a fare of 7 cents (except the contention as to College Park patrons discussed in case No. 464).

#### ALLEGATIONS AND CONTENTIONS OF PETITION AS AMENDED

Prior to 1902 the Electric Company had three lines of street railways running from Atlanta to Decatur; one the Atlanta Railway Company line; another called the North Decatur line, and the third, the South Decatur line. In December, 1902, the Electric Company commenced to take up the tracks of the Atlanta Railway Company line in the Town of Decatur, the Municipality brought an equitable suit to restrain such action. On the 10th day of March, 1903, the Municipality, by ordinance, consented to the taking up of the said tracks in Decatur. This ordinance contained a provision with reference to rates on the Main (North Decatur) line as follows, to wit:

"To never charge more than five cents for one fare upon its Main Decatur line \* \* \* , for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur, to the terminus of the same in the City of Atlanta (Record page 57, a part of paragraph Second)."

Said ordinance accepted by the Electric Company on April 1, 1903, settled the equitable suit. (Record pages 53-58 Exhibit B.)

This provision was alleged to be a valid binding contract perpetually fixing a 5 cents fare.

Prior to 1918 the Electric Company and thereafter the

Power Company charged a 5 cents fare, together with transfers without additional costs, over all its lines.

In 1918 the Power Company made application to the Railroad Commission of Georgia to be permitted a charge of 6 cents fare, and two cents for transfers. On August 14, 1918, the said Commission held: that it lacked jurisdiction to grant the relief asked; that the Georgia Act of 1907 which put street railroads under its jurisdiction was limited by the following proviso:

"Provided, however, that nothing herein shall be construed to impair any valid subsisting contract now in existence between any municipality and any such company and provided that this Act shall not operate as a repeal of any existing municipal ordinance." (Record page 165.)

The Commission construing this proviso held:

"The physical existence of a contract in 1907 between the Town of Decatur and the lessor of applicant, prescribing a 5 cents maximum fare between Decatur and Atlanta is admitted \* \* \* The question as to whether the contracts physically existent were or are valid contracts is not for us to decide \* \* \* Our view is that when in dealing or considering dealing with rates of a street railroad, under the terms of the Act of 1907, we come face to face with a contract or an ordinance, in existence on August 23, 1907, still subsisting, we are estopped until such obstacle is removed in a legal procedure before a court of competent jurisdiction or the General Assembly further acts." (Record pages 165-166.)

In the same order the commission held that in its opinion the applicant was entitled to an increase in its street car fares, and that a fare of 6 cents would be reasonable and just, and made this recommendation to the City Authorities.

"This Commission believes that applicant is entitled to an increase in its street car fares, and that a 6 cents fare would be reasonable and just, so long as existing abnormal war conditions prevail, and the justice of granting such increases by amendment to existing contracts and ordinances, is earnestly urged upon the Councilmanic authorities of Atlanta, Decatur, and College Park, with the assurance on the part of this commission that simultaneously with the effective date of such amendment, similar provisions will be made by it as to fares in territory not included in the municipalities mentioned." (Record page 167.)

On August 23rd, 1918, the Power Company brought mandamus against the Railroad Commission and the individual commissioners to assume jurisdiction under the Act of 1907, and fix fares under the pending application. The Supreme Court (149 Ga., page 1) overruled the Commission, holding that the commission, except as to College Park and Decatur on the North Decatur line had jurisdiction to fix the fares of the Power Company, that College Park and the Town of Decatur (as to the North Decatur line) were protected by contracts, falling within the proviso of said Act.

Subsequent to said decision the Commission, on April 2, 1919, fixed for the Power Company a rate of 6 cents (except where fares were protected by contract with Decatur and College Park). (Record pages 75, 76 Exhibit 1.)

Subsequent thereto (September 22, 1920) the Commission fixed a 7 cents fare, except as prohibited by contracts with Decatur and College Park. (Record page 244 Exhibit C.)

On October 5, 1920, both the Electric Company and the Power Company notified the Municipality in writing denying the validity of said claimed contract and expressly notified

it that on and after October 20th, 1920, the fare provision of the ordinance of 1903 would be terminated. (Record pages 58, 59 Exhibit D.)

This notice caused the present suit, among other things, praying that both the Electric Company and Power Company be perpetually enjoined from charging a higher fare than 5 cents from an point within the present limits of Decatur to Atlanta and from Atlanta to any point within the present limits of Decatur. (Record pages 49, 74, 75.)

**ANSWERS AND CROSS BILLS OF ELECTRIC AND  
POWER COMPANIES AND OF NUMEROUS  
INDIVIDUAL PATRONS OF THE  
STREET RAILWAY COMPANIES.**

Both the Electric Company and the Power Company filed original and amended answers and cross bills (Record pages 218-239 and 245-251, 252, 253). Approximately 20 street car patrons (hereinafter called intervenors), some living on the North Decatur line, between the present boundary of Decatur and City of Atlanta; and some residing on the South Decatur line, and daily using these lines, were made by the Court's order defendants in said case, and filed answers and cross bills wherein they adopted the allegations of the answers and cross bills of the railway companies (Record pages 254-258).

These answers and cross bills alleged substantially as follows:

The Power Company with 212 miles of single track, 157 miles of which is within the City of Atlanta, furnishes street railway transportation to Atlanta and its vicinity. Both the North and South Decatur lines run from Atlanta to Decatur. The North Decatur line beginning at the corner of Pryor Street and Edgewood Avenue in Atlanta, runs over various streets to the corporate limits of Atlanta, 4.724 miles, thence through Kirkwood, thence over private rights of way, thence over public roads of DeKalb County to the former limits of the Town of Decatur, thence in Decatur .993 making a total length of 6.417 miles, only .993 miles being within the corporate limits of Decatur, as they existed in 1903 .

At the time of the mandamus decision supra (149 Ga. page 1) the Power Company charged over all its lines the uniform rate of 5 cents, with free transfers and under the order of Commission of April 2, 1919 (Record pages 75, 76),

that Company charged a 6 cents fare until the Commission's order of September 22, 1920, when thereafter it charged 7 cents fare, except to College Park traffic and Decatur traffic riding on the North Decatur line. (Record page 244 Exhibit C.)

Thus the State of Georgia, through its Railroad Commission, fixed a rate of 7 cents for all passengers on the North Decatur line, except as to passengers leaving or boarding said line within the corporate limits of Decatur; and fixed a rate of 7 cents for all passengers on the South Decatur line.

The Commission discussing the North Decatur line 5 cents fare in its order of September 22, 1920 said:

"The 5 cents fare now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly **compensatory**, and as to the patrons of the company on other routes, and on intermediate territory on these routes, are **discriminatory**. This commission is without authority to increase them."

(Record page 244 Exhibit C).

Thereafter both the Electric Company and the Power Company, on the 5th day of October, 1920, served the municipality with the following written notice:

**"TO THE MAYOR AND COUNCIL OF THE TOWN OF DECATUR AND TO THE TOWN OF DECATUR:**

You are hereby notified that on and after the 20th day of October, 1920, the fares to and from Atlanta and Decatur on the Main or North Decatur line operated by the Georgia Railway & Power Company will be at the rate of seven (7) cents.

Denying the validity or legality of any so-called contract provisions limiting such fares to five (5) cents

(set out in an ordinance of the Town of Decatur and the Georgia Railway & Electric Company); you are notified that even if the provision with reference to fare, to and from Atlanta and Decatur, was binding at any time, it is not now binding or legal, and is hereby terminated from and after the above named date.

This 5th day of October, 1920."

(Record pages 58-59 Exhibit D.)

The grants from the Town of Decatur under which the parts of the North Decatur line, within its limits were constructed, contained no provision with reference to fares. (Record pages 240-244.)

To permit Decatur patrons on the North Decatur line (by virtue of the rate ordinance of 1903) to pay only a 5 cents fare over the whole street railway system, while other patrons by the actions of the State are required to pay 7 cents, would be unjust and discriminatory against all other municipalities and all other individual patrons, except the Decatur passengers using the North Decatur line; and would force the power company to violate the State Constitution (Sections 6464 and 6467) against discrimination.

The effect of a 5 cents fare, to Decatur passengers, on the North Decatur line, and a 7 cents fare all elsewhere is to establish on the same line, on the same cars, two separate and distinct fares, the smaller fare being charged for the longer haul and the greater service, and the larger fare for the shorter haul and less service; and also creates unjust discrimination between Decatur patrons using the North Decatur line and those using the South Decatur line.

Two such rates of fare, as above set out, affecting the entire street railway system, as to other municipalities, the intervenors and all other passengers (save only Decatur patrons on the North Decatur line), violates the 14th Amendment of the Constitution of the United States, in that

it denies to them the equal protection of the law as therein guaranteed.

As against the existence and validity of the 5 cents fare both the street railway companies and the intervenors contended:

**FIRST:**

(a) Neither the municipality nor the railway companies have power to make binding rate contracts.

(b) Said parties are prohibited, from making contracts for fixed fares, irrevocable and unlimited as to time, under the Constitution of the State of Georgia, as set out in Sections 6389, 6464, 6469 and 6563 of the Code of 1914.

**SECOND:**

If said fare provision had ever been a contract it had been terminated prior to the present suit.

(a) By complete performance;

(b) By adequate notice of its termination;

(c) By action of the State of Georgia, through the commission, rendering compliance with said 5 cents fare discriminatory and confiscatory; by increasing the quality and quantity of service, over and above that provided for in the claimed contract.

(d) By Legislative acts of the State of Georgia (Acts 1914 page 703 and 1916 page 681) extending the territorial limits of the 5 cents fare provision, by extention of the corporate limits of Decatur.

If the said Acts of the State of Georgia and said orders of the Railroad Commission (c) and (d) supra, are legally valid, they themselves terminated the claimed fare provis-

ion of the ordinance of 1903; or justified its termination by the railway companies; or required the Court to declare it terminated in this proceeding.

As a result of said acts and orders the cost of Decatur traffic on the North Decatur line was 9.29 cents per passenger (without regard to any return upon its property) and compliance therewith made the 5 cents fare discriminatory, confiscatory and violative of the 14th amendment of the Constitution of the United States:

If said fare provision is still a valid, subsisting and binding contract; then various legislative acts and Acts of the State through its Railroad Commission are illegal and unconstitutional, in violation of Article 1, Section 10, of the Constitution of the United States, in that said state actions impaired the obligations of said contract by placing increased burdens upon the railway companies not provided for and set out in said contract.

The State's actions thus attacked were as follows:

(a) The orders of the Railroad Commission of September 22, 1920 (Record page 244 Exhibit C) requiring an increase in the quality and quantity of service to the Decatur patrons (on the North Decatur line) over and above that provided for in the contract.

(b) The Commission having held that free transfers were not required by the contract (Record page 166), by its order of April 2, 1919 (Record page 76) required the issuing of free transfers thereby increasing the obligations of the contract.

(c) The Acts of 1914 (page 703) and the Acts of 1916 (page 681) extending the corporate limits of Decatur, if construed by the Court, as extending the 5 cents fare to that part of the line thus taken into its limits.

Prior to the passage of said acts the railways, under contracts from the County of DeKalb (Record page 247, paragraphs 10, 11, 12, 13 and 14) constructed the portions of the line thus taken into the municipality in which there were no provisions as to fares. If said acts extended the 5 cents fare over said portion of the line, they impaired the obligation of the DeKalb County contract, contrary to Article 1, Section 10, of the U. S. Constitution.

(d) The Legislative Act (Georgia Laws 1907, page 73, et seq.) amended by the acts of 1919 (Georgia Laws 1919, page 94) (as construed and enforced by the highest State Court) renders said act unconstitutional, in violation of the 14th Amendment to the Constitution of the United States, for as so construed said act permitted the Railroad Commission to change all contract rate of fare between street railway companies and private parties, whenever made; all contract rates between street railway companies and municipalities subsequent to August 23, 1907; all contract rates between street railway companies and municipalities prior or subsequent to 1907, where the street railway company has its principal office and operate lines of Railroad in counties having a population of not less than 75,000 nor more than 125,000, excluding only from the jurisdiction of the Commission rate contract with municipalities in counties having a population under 75,000 or over 125,000 of date prior to August 23, 1907. The said Acts and amendment so construed, fixed a discriminatory, illegal and an unreasonable classified scheme of rates and deny the street railway companies, its individual patrons and the municipalities of Georgia the equal protection of the law guaranteed to them by the 14th Amendment to the Constitution of the United States.

(e) If the orders of the Commission (heretofore referred to) are held by the Court to be valid and legal, then the Act of August 23, 1907 (Georgia Laws 1907 page 73 et seq.), as thus construed, and enforced empowers the Commission as

to Decatur traffic, on the North Decatur line, to render its costs confiscatory, while it withholds from the Commission the jurisdiction to fix reasonable rates therefor, thereby confiscating the property of the street railway companies, and deny to them the equal protection of the law guaranteed by the 14th amendment of the Constitution of the United States.

The cross bills also set up and allege, that if the court should hold that the rate provision of the claimed contract was still of force and effect; the Electric Company and the Power Company offered to surrender all rights to operate its said North Decatur line within the present limits of Decatur. The costs of operating the North Decatur line within the present limits of Decatur amounted to 9.29 cents per Decatur passenger, said amount being now and for all time confiscatory, not paying but about one-half of the operating expenses without any return for the service rendered. To compel such operation is in violation of the 14th Amendment to the Constitution of the United States in that it confiscates the property of the street railway company and denies to them the equal protection of the law. The railroad companies asked a decree, if the claimed rate provision was still in force and effect, permitting them to cease all operation of the North Decatur line within the limits of Decatur and in connection therewith, the intervenors contended that if the deficiency in the North Decatur fares be indirectly transferred to them by the Commission, increasing the fare they must pay, then they would be deprived of their property in violation of the 14th Amendment to the Constitution of the United States.

The prayers in the answers and cross bills were in accordance with the allegations therein. (Record pages 239, 257 and 258.)

### RULINGS OF THE COURT

The Superior Court of DeKalb County granted the municipality a temporary restraining order and it was affirmed by the Supreme Court on writ of error. (Record pages 19-23; 152 Ga. 143-148). Thereafter the Judge of the Court, on general demurrer, struck the amended answers and cross bills of the street railway companies (Record page 207) and of the intervenors (Record pages 217-218); and then directed a verdict for and rendered a final decree in favor of the municipality, granting all the prayers of the petition and permanently enjoining the railway companies as prayed in the petition as amended. (Record pages 258-259). These judgments on the demurrer, direction of the verdict, and the granting of the decree were excepted to (Record pages 23-39) and carried by writ of error to the Supreme Court of Georgia and there affirmed. (Record pages 15-19) (153 Ga. 329-335.)

### EFFECT OF JUDGMENT ON DEMURRER AND DECREE.

The effect of the judgments sustaining the demurrer, directing a verdict and rendering a decree was: (a) to hold the 5 cents contract rate still in force; (b) extend its operation to that part of the line **subsequently** taken into the **present territorial** limits of Decatur; (c) to uphold and compel performance of the subsequent orders of the Commission and Legislative Acts, as against the attacks made on them in the answers and cross bills, as amended; (d) to deny to the railway companies the right to terminate the claimed fare contract or the right to discontinue the operation of their line within Decatur.

## **JUDGMENT SUSTAINING GENERAL DEMURRER TO ANSWERS AND CROSS BILLS.**

The various rulings, judgments and decrees of the State Court are brought to this Court for review, both by writ of error and petition for certiorari. The granting of the general demurrer to the answers and cross bills, as amended, is an admission of the truthfulness of all the facts therein set out.

### **SPECIFICATION OF ERRORS RAISED AND RELIED UPON**

The assignments of error brought to this Court for review are:

(1) Under the undisputed facts in the case, forced compliance by the Railway Companies, plaintiffs in error, with the ordinance of the Mayor and Council of the Town of Decatur, made applicable to said railways, dated April, 1903, binding said railway companies,

plaintiff in error, among other things;

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line \* \* \* for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the town of Decatur,"

confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Company.

(a) The State Court erred in not holding said provision unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States.

(b) The State Court erred in holding that said provision constituted a contract between the Mayor and

Council of the Town of Decatur and the Georgia Railway and Electric Company and Georgia Railway and Power Company, because (1) neither of said parties had any right, power or authority to make binding contracts as to fares; (2) said parties are prohibited from making contracts for fixed fares, irrevocable and unlimited as to time, by the Constitution of the State of Georgia, set out in Sections 6389, 6464, 6467 and 6563, of the Code of 1914 of said State.

(c) Said State Court erred in not holding that if said provision was ever a contract; it had ended prior to the pending suit; by complete performance; by adequate notice of its termination; by the action of the State of Georgia, through the Commission, by which further forced compliance with said five cents fare was rendered discriminatory and, therefore, illegal and confiscatory; by the action of the State of Georgia, through orders of the Railroad Commission, requiring the giving of transfers on payment of said five cents fare (thus entitling Decatur passengers to ride over the entire street railway system for five cents, while other passengers on the same line and for less identical character of service, are required to pay seven cents), and by orders of said body increasing the quality of service over and above that provided for in the claimed contract; by the legislative acts of the State of Georgia (Georgia Acts 1914, page 703, and Georgia Acts 1916, page 861) extending the corporate limits of the Town of Decatur.

The State Court held that all of said orders and acts of the State were and are legal, valid and binding, and forced compliance therewith. This said construction by the Court of the ordinance of April 1903, together with forced compliance by said railway companies with said orders and acts of the State aforesaid, render the rate

provision of said ordinance invalid and violative of the Fourteenth Amendment to the Constitution of the United States, in that it confiscates the property of plaintiffs in error and denies them the equal protection of the law guaranteed therein.

(2) Under the undisputed facts in the case, forced compliance with said ordinance of April, 1903, to wit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line \* \* \* for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur,"

violates the Fourteenth Amendment to the Constitution of the United States as to the individual intervenors in said case, in that it denies to them and all other citizens and patrons, than those leaving or boarding the cars of the street railway companies in the Town of Decatur, the equal protection of the law as therein guaranteed; that said provision of said ordinance, and the action of the State of Georgia by and through the Railroad Commission of said State, and the construction placed upon same by the State Court, required the individual intervenors and all other citizens (except Decatur patrons) to pay seven cents for the same or less service while Decatur patrons, for a similar or greater service, are charged only five cents.

(3) Because of the legislative act of the State of Georgia (Acts of 1907, page 73 et seq.) as construed and enforced by the State Court, and amended by the Act of August 18, 1919 (Georgia Laws 1919, page 94);

(a)

Renders said act unconstitutional and violative of the Fourteenth Amendment to the Constitution of the

United States; in that it denies the plaintiffs in error, individually and collectively, the equal protection of the law and fixes a discriminatory and illegal scheme of rates, in that said act places under the jurisdiction of the Railroad Commission of Georgia the right, power and authority to change rates of fare fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway company having its principal office and operating lines of railroad in counties having a population of less than 75,000 and more than 125,000. There is no legal or reasonable classification with reference to the contracts executed and those placed under said Commission's jurisdiction, and as a result of said discriminatory exception, the individual plaintiffs in error and all other patrons of the street railway companies, except those boarding or alighting from cars in Decatur, are required to pay seven cents fare, while those boarding or alighting from cars in Decatur pay only a five cents fare.

(b)

Said Act of 1907 (Georgia Acts 1907, page 73 et seq.) as construed and enforced by the court, violates the Fourteenth Amendment to the Constitution of the United States, in that the Court holds that the said act withholds from the Railroad Commission of Georgia the right, power or authority to change the five cents fare provision of said ordinance of April, 1903 (as set out in assignment of error No. 1), but holds that said act confers jurisdiction upon said Commission to increase the quality and quantity of service rendered, and empowers the said Commission to require the issuing of transfers upon payment of the fare provided for in said ordinance; and said act, thus construed and enforced, confiscates the property of the Georgia Railway & Electric Company and the Georgia Railway & Power Com-

pany without due process of law, and denies them the equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c)

Said Acts of 1907 (Acts 1907, page 73, et seq.) as construed and enforced by the Court against the individual intervenors, plaintiffs in error, fixes an illegal and discriminatory scheme of rates, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the Court holds that under and by virtue of said act, authority and powers are conferred upon the Railroad Commission of Georgia to fix a seven cents rate of fare for less or similar service rendered to the individual intervenors and other persons and patrons similarly situated, while it maintains and keeps in force a five cents rate of fare for a greater or similar service rendered Decatur patrons by the same street railway companies operating the same system and over the same lines.

(4) The Court having held that the provisions of the ordinance of April, 1903, of the Mayor and Council of the Town of Decatur, to wit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line \*\*\* for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the town of Decatur,"

is a binding contract between the Mayor and Council of the Town of Decatur and the Georgia Railway & Electric Company and the Georgia Railway & Power Company, the court erred in not holding the legislative act of the State of Georgia of 1907 (Acts 1907, page 73, et seq.) as construed by the court violates Article 1,

Section 10, of the Constitution of the United States, in that said Act, as thus construed, impairs the obligation of said contract by increasing its burdens; in that the court held that under said Act of 1907, the State Railroad Commission had the jurisdiction and power to increase the quality and quantity of service rendered for said five cents fare. The court erred in not holding that said act and the orders of the Railroad Commission issued thereunder, adding to said claimed contract by increasing its burdens by increasing the service, were unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States, in that they impair the obligations of the contract upheld by the court.

(5) Under the provisions of the ordinance of the Mayor and Council of the Town of Decatur of April, 1903, towit:

"To never charge more than five cents for one fare upon its (plaintiffs in error's) main Decatur line \* \* \* for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur."

held by the court to be a contract, a five cents rate of fare is provided for only from the terminus of said line **in the City of Atlanta to the terminus** of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta; the trip either way shall include the entire loop in the town of Decatur. The Court held that the legislative acts of the State of Georgia (Acts 1907, page 73, et seq.), and the orders of the Commission under and by virtue of said Act, made said five cents fare provision operative from other points in the Town of Decatur to other points in the City of Atlanta. Such construction placed upon said acts and orders im-

pairs the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States, in that it places increased burdens upon the plaintiffs in error, not provided for and set out in said contract, and the Court erred in not holding said acts and orders unconstitutional.

(6) Because the court, having held that the fare provision of the ordinance of April, 1903, as set out in assignment of error No. 1, constituted a contract, erred in not holding that the acts of the General Assembly (Acts 1914, page 703, and Acts 1916, page 681) violate Article 1, Section 10, of the Constitution of the United States;

(a)

In that each impairs the obligations of said contract, for that said acts, as construed by the Court, extended the five cents fare provision of said contract to territory added to the town of Decatur after the execution of said contract and extended its provisions to territory not included therein at the time the contract was executed.

(b)

Because the undisputed facts shows that the County of DeKalb entered into a contract with the Georgia Railway & Power Company and Georgia Railway & Electric Company, under and by virtue of which contract the tracks of said street railway companies were placed in the public roads of the County of De Kalb, between the City of Atlanta and the Town of Decatur, and by said contract the fares to be charged passengers boarding the cars therein were not limited to five cents. The construction placed by the Court upon said legislative act of 1914 and 1916 required the street railway companies to charge only five cents fares to passengers boarding and alighting from cars within said territory; and said acts, thus construed, impair the

obligations of said contract, adding additional burdens thereto, and the Court erred in not holding said acts unconstitutional, in violation of Article 1, Section 10, of the Constitution of the United States; for that under said acts and said construction there is imposed a five cents fare for passengers boarding and alighting from cars in said former territory.

(7) The ordinance of April, 1903, as set out in assignment of error No. 1, and as construed by the Court, makes the said ordinance violative of the Fourteenth Amendment to the Constitution of the United States, for that it denies to plaintiffs in error the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, for that the five cents fare provision therein contained is, under the undisputed facts, confiscatory; and to compel the Georgia Railway & Electric Company and the Georgia Railway & Power Company to continue to operate under and by virtue of the same, and denying them the right to terminate all its lines under and by virtue of said claimed contract and to cease to operate its street railway lines within the Town of Decatur, and to compel said street railway companies to permanently devote their property to public use, without any compensation therefor, and to compel them to continue public service in said territory without reference to the value of the service rendered, thus confiscates the property of said companies.

(Record pages 5-10.)

#### **MAIN CONTENTION OF MUNICIPALITY**

The Municipality's case was predicated upon its contention that a valid binding rate contract existed at the time of the institution of its suit. If such contention is not sustained, a reversal will necessarily follow.

Central Power Company vs. City of Kearney, 274 Fed. 253.

Knoxville Gas Co. vs. City of Knoxville, 261 Fed. 284 (6).

Raleigh & Gaston R. R. Co. vs. Swanson, 102 Ga. 754.

#### **CONTENTIONS OF ELECTRIC COMPANY, POWER COMPANY AND INTERVENORS.**

The Railway companies and the intervenors contend:

(1) That the rate provision of the ordinance of 1903, was not a binding contract at the time of the institution of this suit.

(2) If the said rate provision is held to be a binding contract, then subsequent statutes of the State of Georgia and orders of the Railroad Commission of Georgia unconstitutionally impair the obligations of said contract in violation of Article 1, Section 10, of the Constitution of the United States; and also unconstitutionally confiscate the property of both railway companies and the intervenors, and deny them the equal protection of the law guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

(3) The Legislative Acts conferring jurisdiction upon the Commission in certain cases, and withholding it in others are unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States.

(4) The street railway companies have the right under the Fourteenth Amendment to the Constitution of the United States to cease operating its North Decatur line in Decatur.

**A FEDERAL QUESTION IS RAISED WHETHER OR NOT  
THE ORDINANCE OF THE TOWN OF DECATUR  
OF 1903 IS A CONTRACT.**

If it be held that the claimed rate contract is still in existence, it is then contended that subsequent statutes of the State and orders of the Railroad Commission, unconstitutionally impair the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States.

This Court has repeatedly held that when the contract clause of the United States Constitution is invoked, this Court determines for itself (1) Is there a contract? (2) If so, what obligations arose from it? (3) Has that obligation been impaired by subsequent legislation?

Detroit United Railway Company vs. Michigan, 242 U. S. 238, 249.

Milwaukee Electric Ry. Co. vs. Wisconsin, 252 U. S. 100, 103.

Stearns vs. State of Minnesota, 179 U. S. 223, 232.

This Court determines these questions for itself for the reason that otherwise the State courts might, by their decision, deprive parties of their federal constitutional rights.

McCullough vs. Commonwealth of Va., 172 U. S. 102, 109.

Similarly, when the Fourteenth Amendment to the Constitution of the United States is invoked against an ordinance, confessedly discriminatory and confiscatory, and the claim is made that it is binding as a contract, the determination of the question is a federal question; otherwise the State Court in erroneously holding an ordinance or statute to be a contract, might defeat the constitutional guarantee

against confiscation of property, and deny a party the equal protection of the laws.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

Headley's Admr. vs. San Francisco, 125 U. S. 639, 645.

In determining like questions this Court has refused to follow the State Court's construction of its own Constitution.

University vs. People, 99 U. S. 309, 323.

## I.

**RATE PROVISION OF THE ORDINANCE OF 1903 NOT A CONTRACT.**

This question is raised in the first assignment of error (Record pages 5-5); see Brief page 14.

**NOT IN SUBSTANCE A CONTRACT.**

On March 10th, 1903, the Town of Decatur passed an ordinance permitting the removal of the tracks of the Atlanta Railway Company in the Town of Decatur (See Record pages 55, 58). The ordinance begins "Be it ordained by said Mayor and Council and it is hereby ordained by said authority" and ends "Be it further ordained that all ordinances or parts of ordinances in conflict herewith are hereby repealed." Such words as to all matters therein contained, including the rate section indicate municipal legislation and not a municipal contract.

The Town of Decatur was not undertaking to fix a rate contract for itself. Under the Constitution of Georgia (Section 6563) it could make a contract for itself for only one year.

Americus Ry. & Lt. Co. vs. Mayor, etc., of Americus,  
136 Ga. 25.

City of Dawson vs. Dawson Water Works Co., 106  
Ga. 699, 726.

Such contract would be operative only so long as neither party repudiated it.

Knight vs. Suddeth & Crenshaw, 126 Ga. 231 (1).

Americus Ry. & Lt. Co. vs. Mayor, etc., of Americus,  
136 Ga. 25 (3).

*refers to*  
The municipality ~~relies on~~ these cases, by alleging that the contract is not with or for the municipality, but one made by the municipality acting as agent for the State, and in the interest of all parties boarding or alighting from cars within the corporate limits of the municipality. (Record page 73, paragraph 18).

Such a regulation of fares, however, is governmental and not contractual.

San Antonio Pub. Service Com. vs. San Antonio, 257 Fed. 467, affirmed in 255 U. S. 547.

South Pasadena vs. Los Angeles, 41 Pac. 1004.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S., 265.

State and County of Denver vs. Stenger, 277 Fed. 685.

Georgia R. R. vs. Smith, 70 Ga. 694, 703; affirmed 128 U. S. 174.

Milwaukee Elec. Co. vs. Wisconsin, 238 U. S. 174.

In the case of City of Arcata vs. Green, et al., 106 Pac. 86, the court in passing upon municipal action claimed to be a contract said:

"The ordinance here does not confine its scope to any individual or number of individuals, but attempts to regulate the fares paid by the general public—all persons, wherever resident; in short, is of governmental character, and not a contract."

It is, however, conceded by the municipality that even though a contract, the State is not bound by its rate provision, but may, either by itself or by a Commission, having jurisdiction, change it at will. If this be so, then the contract provision lacks mutuality and cannot bind the street railways to this confiscatory rate.

Central Power Co. vs. City of Kearney, 274 Fed. 253 (2).

City and County of Denver vs. Stenger, 277 Fed. 865, 870.

Opelika Sewer Co. vs. City of Opelika, 280 Fed. 155, 159.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 558.

Nor is the municipality bound by such rates.

Horkan vs. City of Moultrie, 136 Ga. 561.

Neal vs. Town of Decatur, 142 Ga. 205.

#### **MUNICIPALITIES IN GEORGIA GIVEN NO AUTHORITY TO ENTER INTO BINDING RATE CONTRACTS.**

No legislative enactments, no constitutional provision confers upon a Georgia municipality the power to make rate contracts.

City of Atlanta vs. Old Colony Trust, 88 Fed. 859.

Horkan vs. City of Moultrie, 136 Ga. 561.

Where no such power has been expressly conferred, this Court has repeatedly held that a confiscatory rate cannot be upheld on the claim that there existed a municipal rate contract.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

Milwaukee Elec. Co. vs. Wisconsin, 238 U. S. 174.

City of Englewood vs. Denver & A. P. Ry. Co., 248 U. S. 294.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

## GEORGIA CONSTITUTIONAL PROVISIONS PREVENT A MUNICIPALITY FROM MAKING RATE CONTRACTS.

The Constitution of Georgia prohibits the Legislature from making rate contracts. If the State cannot make rate contracts, then clearly it cannot grant such power to a municipality.

Town of Pacific Junction vs. Dyer, 19 N. W. 862, 863.

City of Mitchell vs. Board of R. R. Commissioners,  
184 N. W. 246.

The Constitution of the State of Georgia, Article 1, Section 10, paragraph 2, provides: "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligations of contracts, or **making irrevocable grants of special privileges or immunities, shall be passed.**"

This Court, in San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 447, held that a similar constitutional provision of the State of Texas prevented a municipality of that State from entering into a binding contract and enjoined a confiscatory rate, although the municipality claimed the benefit of a rate contract.

The Constitution of the State of Georgia, Article 4, Section 2, paragraph 3, provides: "The exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

In O'Keefe vs. City of New Orleans, 273 Fed. 560, the Court held that a similar provision of the Louisiana Constitution prevented a City of that State from claiming a binding confiscatory rate contract.

In Opelika Sewer Company vs. City of Opelika, 280 Fed. 155, the Court held that a constitutional provision of Alabama prevented a municipality of that State from making a binding rate contract.

In the City and County of Denver vs. Stenger, 277 Fed. 965, the United States Circuit Court of Appeals held that a constitutional provision of Colorado, similar to that of Georgia, prevented a municipality from making a binding rate contract. To the same effect:

City of New Orleans vs. O'Keefe, 280 Fed. 92.

City of Mitchell vs. Board of R. R. Commissioners, 184 N. W. 246.

**STREET RAILWAY COMPANIES HAVE NO POWER OR AUTHORITY TO ENTER INTO BINDING RATE CONTRACTS.**

Public utilities are incorporated for the purpose of serving the public, impartially, equally, without preference, and without discrimination, and therefore cannot enforce a claimed rate contract which prevents it from fulfilling the very purpose of its incorporation.

Thomas vs. United States, 101 U. S. 74 (4).

Article 4, Section 2, Paragraph 1 of the Constitution of the State of Georgia provides: "The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring **reasonable** and **just** rates of freight and passenger tariffs are hereby conferred upon the General Assembly."

This power (to fix rates) is reserved by the Constitution to the state.

Georgia Railway & Power Company vs. Town of Decatur, 152 Ga. 143, 146.

In *Wyndotte Gas Co. vs. Kansas*, 231 U. S. 622, the Court held that a statute giving a municipality the right to contract for reasonable and just rates prevented the enforcement of a rate when it became too high. Since the power was to make **reasonable and just rates**, the parties were unable to contract for **unreasonable rates**.

Similarly, the Georgia constitutional provision *supra*, "preventing unjust discrimination, and requiring **reasonable and just rates** of passenger tariffs" has the same effect. The municipality can no more enforce the discriminatory and confiscatory rate in the case at bar, than could the Gas Company in the *Wyndotte* case.

If the street railway and municipality each had express power to make rate contracts, this Georgia constitutional provision would have prevented the enforcement of an unjust, unreasonable and discriminatory rate.

This question cannot be better expressed than by paraphrasing the language of this Court on page 630 (231 U. S.); in the face of such a plain manifestation of the constitutional will, it would be a departure from the obvious intention of the purpose of the law maker to hold that the constitution permitted the legislature to confer the power to do that which the text makes it apparent there was a dominant and fixed purpose of the constitution to forbid. See also

*Tampa Water Works Co. vs. Tampa*, 199 U. S. 241-242.

*State vs. St. Louis S. W. Ry. Co.*, 197 S. W. 1006.

The Georgia Constitution, Article 4, Section 2, Paragraph 2 is as follows:

"The exercise of the police power of the State shall never be abridged, nor so construed as to permit corpo-

rations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well being of the State."

This provision also prevents the railway company from making a binding rate contract.

**City and County of Denver vs. Steenger, 277 Fed. 865.**

**Opelika Sewer Co. vs. City of Opelika, 280 Fed 155.**

**O'Keefe vs. City of New Orleans, 273 Fed. 560, affirmed 280 Fed. 92.**

**CLAIMED RATE PROVISION TERMINATED PRIOR TO INSTITUTION OF PRESENT SUIT.**

(a) By adequate notice of its termination.

Where there is no constitutional inhibition, a state may by express language grant a municipality the power to make rate contracts for a limited time, not too long extended.

**Home Tel. & Tel. Company vs. Los Angeles, 211 U. S. 265.**

This Court has in no instance upheld City-made rate contracts of indefinite duration or unreasonably extended.

By State action the claimed contract had become not only confiscatory but discriminatory, the continuance of which "necessarily would have engendered the enforcement of two rates of fare over the same line leading to consequences dangerous to public interest, peace and tranquility, the extent of which it would be difficult in advance to perceive."

**City of Cleveland vs. Cleveland City Railway Co., 194 U. S. 517, 531.**

Following the declaration of the Railroad Commission that the Decatur rate was confiscatory and discriminatory and beyond its power to change (Record page 244 Exhibit C), the railway companies on October 5th, 1920, gave notice that the claimed rate would be terminated on the 20th of October, 1920 (Record pages 58, 59). thus terminating the rate.

Bearden Merc. Co. vs. Madison Oil Co., 128 Ga. 703.

Risley vs. City of Utica, 179 Fed. 875 (4), 885.

#### **RATE CONTRACTS INDEFINITE AS TO DURATION— TERMINABLE UPON REASONABLE NOTICE.**

The rate provision of 1903 was indefinite as to duration and therefore terminable upon notice.

In the case of Texas Railway Company vs. City of Marshall, 136 U. S. 393, the City of Marshall gave the railroad company \$300,000.00 in county bonds, and 66 acres of land in the city limits, in consideration that the company would permanently establish its western terminus, and maintain therein its machine shops and car works; this Court held that the contract was **performed** when the company had complied with it for a period of eight years, and until its interest and the public demand required the removal of the terminus and machine shops to some other place.

In case of Jones vs. Newport News & M. Co., 66 Fed. 736, 741 (2), Chief Justice Taft, dealing with a contract to maintain a switch, said:

“The petition makes no better case for the plaintiff on the theory of a contract than on a common law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite length of time, or that either ex-

pressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch is to be maintained at all times, i. e., forever. Such a construction is quite at variance with the views of the Supreme Court as expressed in *Texas & P. Ry. Co. vs. City of Marshall*, 136 U. S., 393."

See also

*Risley vs. City of Utica*, 179 Fed. 873 (4), 885.  
*Western Union Tel. Co. vs. Pennsylvania*, 125 Fed. 76.  
*Texas Ry. Co. vs. Scott*, 77 Fed. 726 (2).  
*McCullough-Dalzell Crucible Co. vs. Philadelphia*, 72 Atl. 633.

#### **RATE PROVISION TERMINATED BY ACTION OF THE STATE.**

The rate in question was terminated by the action of the State, through its commission, by making further compliance with the 5 cents fare discriminatory and illegal.

The orders of the Commission, increasing the fare to 6 and then to 7 cents, were equivalent to an Act of the Legislature making such increases.

*Arkadelphia Milling Co. vs. St. Louis S. W. R. Co.*, 249 U. S. 134.

*Oklahoma Operating Co. vs. Lane*, 252 U. S. 331, 335.

These acts of the State made the 5 cents North Decatur fare unjustly discriminatory for it permitted the North Decatur traffic to ride for 5 cents and other passengers using the same cars, riding a less distance, are charged 7 cents.

**City of Cleveland vs. Cleveland City Ry. Co., 194 U. S. 517.**

**State Ex Rel vs. Omaha, C. B. & C. R. Co., 52, L. R. A. 315.**

The Commission of Georgia expressly held, thereby establishing the fact (which is also admitted by demurrer) that the North Decatur rate was unjustly discriminatory.

**Manufacturers Co. vs. United States, 246 U. S. 457, 481, 482.**

That the Commission had no power itself to correct such discrimination did not in any way effect the discriminatory and illegal character of the rate.

**Houston E. & W. T. R. Co. vs. United States, 234 U. S. 342.**

When a rate contract becomes unjustly discriminatory, because of other rates fixed by State action, the discriminatory rate contract cannot be used either as a sword for offense, or a shield of defense, for it then comes under the ban of the common law.

**Postal Cable Tel. Co. vs. Cumberland Tel. & Tel. Co., 177 Fed. 726, 728;**

and Georgia Constitution and legislative provisions.

### **FORBIDDEN BY THE CONSTITUTION OF THE STATE OF GEORGIA.**

In the Constitution of the State of Georgia the following provisions appear:

**Sec. 6463: "The power and authority of regulating railroad freights and passenger tariffs, preventing un-**

just discriminations and requiring reasonable and just rates of freight and passenger tariffs are hereby conferred upon the General Assembly, whose duty it shall be to pass laws, from time to time, to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit said roads from charging other than just and reasonable rates, and enforce the same by adequate penalties."

Sec. 6464: " \* \* \* the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State."

Sec. 6467: "No railroad company shall give or pay any rebate, or bonus in the nature thereof, directly or indirectly, or do any act to mislead or deceive the public as to the real rates charged or received for freights or passage; and any such payments shall be illegal and void; and these prohibitions shall be enforced by suitable penalties."

These constitutional provisions in and of themselves render discriminatory rate contracts illegal and unenforceable.

Rhode Island vs. Palmer, 253 U. S. 250, 386, 387 (6, 7).

Tampa Water Works Co. vs. Tampa, 199 U. S. 241.

State vs. St. Louis S. W. Ry. Co. of Texas, 197 S. W. 1006.

California Adjustment Co. vs. Southern Pac. Co., 266 Fed. 349.

Hurley vs. Big Sandy, Etc., R. Co., 137 Ky. 216.

Gandolfo vs. Hartman, 49 Fed. 181.

Altenberg vs. Grant, 85 Fed. 345.

**FORBIDDEN BY THE STATUTE LAW OF GEORGIA.**

Code Sections 2628 and 2629 are as follows:

"If any railroad corporation organized or doing business in this State under any act of incorporation or general law of this State now in force or which may hereafter be enacted, or any railroad corporation organized or which may hereafter be organized under the laws of any other State, and doing business in this State, shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use and transportation of any railroad car upon its track, or any of its branches thereof, or upon any railroad within this State which it has the right, license, or permission to use, operate, or control, the same shall be deemed guilty of extortion, and, upon conviction thereof, shall be dealt with as hereinafter provided."

"If any railroad corporation as aforesaid shall make any unjust discrimination in the rate or charges of toll or any compensation for the transportation of passengers or freights of any description, or for the use of transportation of any railroad car upon its said road, or upon any of the branches thereof, or upon any railroad connected therewith, which it has the right, license or permission to operate, or use within this State, the same shall be deemed guilty of having violated the provisions of this article, and, upon conviction thereof, shall be dealt with as hereinafter provided."

Under these statutes and the Constitution of the State, the North Decatur 5 cents fare is none the less discriminatory because fixed by a claimed contract.

Portland Railway Light & Power Co. vs. R. R. Commission of Oregon, 229 U. S. 397, 414.

The Commission had been given no power or authority to remove this discrimination, but the fact of unjust discrimination being established, the Courts have jurisdiction to end it.

Houston East & West Ry. Co. vs. United States, 234 U. S. 342.

Am. Ry. Express Company vs. South Dakota, 244 U. S. 617.

Tift et al. vs. Southern Ry. Co. et al., 123 Fed. 789 (5).

The Court can remove the discrimination by raising North Decatur rates to that fixed by the Commission.

American Ry. Express Co. vs. South Dakota, 244 U. S. 617.

**A RATE NON-DISCRIMINATORY WHEN EXECUTED  
MAY SUBSEQUENTLY BECOME AN ILLEGAL  
AND DISCRIMINATORY RATE.**

It is not enough that the rates were claimed to be non-discriminatory in 1903. A rate contract, valid when made, may become illegal.

Armour Packing Co. vs. United States, 209 U. S. 56.

Louisville & Nashville R. R. Co. vs. Mottley, 219 U. S. 467; see page 484.

Elliott Machine Co. vs. Center, 227 Fed. 124, 126.

Leonard vs. American Life & Annuity Co., 138 Ga., 274, 276.

When the State of Georgia fixed rates elsewhere which rendered the North Decatur rate discriminatory, the ordinance of 1903 having become discriminatory and confisca-

tory by state action, was unenforceable as a valid rate contract.

Leonard vs. American Life & Annuity Co., 139 Ga. 274, 276.

Raymond Lumber Company vs. Raymond L. & W. C., L. R. A. 1917C page 574.

McLendon vs. City of LaGrange, 107 Ga. 357.

**RATE CONTRACT TERMINATED BY STATE ACTION  
MAKING RATE CONFISCATORY AS WELL  
AS DISCRIMINATORY.**

In this discussion the various orders of the Commission are to be taken, as the court took them below, in the demur-  
rer, as valid.

The order of the Commission of September 22nd, 1920, increased the quality and quantity of street railway service with reference to North Decatur traffic. (Record p. 245.)

These orders increased the cost of serving North Decatur traffic, thereby making the 5 cents fare confiscatory.

Mississippi R. Co. vs. Mobile & O. R. Co., 244 U. S., 388.

Washington & P. C. Ry. Co. vs. Magruder, et al., 198 Fed. 218 (3).

Union Dry Goods Co. vs. Public Service Corp., 142 Ga. 841, 846.

The inability of the Commission to change the rate does not prevent the Court from declaring the rate unconstitutional, and in violation of the Fourteenth Amendment of the Constitution of the United States. Even if the Commission had fixed the rate the Courts can be appealed to.

Chicago Ry. Co. vs. Minnesota, 134 U. S. 418, 458.  
Reagan vs. Farmers' Loan & Trust Company, 154 U. S. 326.  
Smyth vs. Ames, 169 U. S. 466, 526.

The Commission fixed an integral part of the rate when it required increased transportation and service.

Mississippi R. Co. vs. Mobile & O. R. Co., 244 U. S. 388.  
Washington & P. C. Ry. Co. vs. Magruder, et al., 198 Fed. 318 (3).

The fact that the deficiency in North Decatur traffic is made up by requiring other passengers to pay higher rates does not prevent the claimed contract rate, plus the transportation service required, being unconstitutional and confiscatory.

Vandalia Railroad Co. vs. Schnull, 255 U. S. 113.  
N. & W. Ry. Co. vs. W. Va., 236 U. S. 605.  
No. Pac. Ry. Co. vs. North Dakota, 236 U. S. 585.

Some of the intervenors are parties living upon the North Decatur line, but not in Decatur. If the deficiency of the North Decatur service be made up by charging these intervenors a higher rate of fare their property would be confiscated.

Vandalia Railroad Co. vs. Schnull, 255 U. S. 113, 118.

## **RATE PROVISION TERMINATED BY LEGISLATIVE ACTS OF GEORGIA EXTENDING TERRITORIAL LIMITS.**

When the claimed contract provision was passed in 1903 the incorporate limits of Decatur included only a small part of the North Decatur line.

The Legislature (Georgia Laws 1914, page 703, and 1916, page 681) extended the limits of Decatur towards the City of Atlanta, thereby taking in about a mile of the North Decatur line not theretofore in the limits of the municipality. The State Court held that these Legislative Acts extended the 5 cents rate to all passengers leaving or boarding cars within this added territory, thus increasing the number of passengers to be served at the confiscatory rate, and increasing the losses theretofore sustained.

On the line of reasoning adopted by the Court, the Legislature, by appropriate extension of Decatur to take in all the lines of the street railway, would apply to them this 5 cents confiscatory fare. The Legislative Acts in question, thus being construed, increased the service to be rendered for the claimed 5 cents fare, making such rate confiscatory.

## **II.**

### **SECOND ASSIGNMENT OF ERROR.**

In the second assignment of error (Record p. 6 (2) this brief, page 16 supra) intervenors attacked further compliance with this 5 cents fare, in that it denies to them and all other patrons of the railway company (other than the North Decatur traffic) the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States, for that the intervenors pay 7 cents

fare for less service, while the North Decatur patrons enjoy 5 cents fare for a greater transportation service.

The intervenors claim a separate and independent right to have this fare declared unconstitutional. The North Decatur patrons pay 5 cents, whereas the intervenors on the same cars, for less service, pay a Legislative fixed rate of 7 cents. The Legislature could have given the Commission jurisdiction over this 5 cents rate, its failure to do so was a Legislative recognition of such rate.

If the Legislature had, itself, fixed a 7 cents fare on all the Decatur lines, except for such passengers as embarked or disembarked in Decatur on the North Decatur line, and had for them fixed a 5 cents fare, there could have been no question but that the intervenors had been denied the equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

Cotting vs. Goddard, 183 U. S. 79.

Gulf C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, 159.

Yick Wo vs. Hopkins, 118 U. S. 356.

Connally vs. Union Sewer Pipe Co., 184 U. S. 539, 556.

The intervenors were not parties to the Decatur contract. The Legislative rate is binding upon them. That fact renders a municipal rate unconstitutional when attacked by them. The intervenors are not inhabitants of Decatur and the Municipality cannot bind them by illegal and discriminatory contract rates.

The above discussion, under the first assignment of error, though not repeated, is applicable here.

## III.

**THIRD ASSIGNMENT OF ERROR**

In section (a) of the third assignment of error (Record p. 6 and 7, also in brief pages 16) the Act of the State of Georgia of 1907, pages 73 et seq., amended by the laws of 1919, page 94, as construed and enforced by the State Courts is attacked as being violative of the Fourteenth Amendment to the Constitution of the United States, in that there is no reasonable classification with reference to contracts excepted and those placed under the Commission's jurisdiction.

The Railroad Commission of the State of Georgia was created by the Acts of 1878-79, page 125 et seq., and would have applied to street railway companies had not the Act expressly excluded them.

Savannah Railway Company vs. Williams, 117 Ga. 420.

The Acts of 1907, page 73 et seq., extended the powers of the Railroad Commission over street railways. The first part of Section 5 of this act, now embodied in Section 2630 of the Code of Georgia, provided: "The power to determine what are just and reasonable rates and charges is vested exclusively in said Commission."

A part of Section 5, of said same Act, now Code Section 2662, provides: "The powers and duties heretofore conferred by law upon the Railroad Commission are hereby extended and enlarged, so that its authority and control shall extend to street railroads, and street railroad corporations, companies, or persons owning, leasing or operating street railroads in this State. Provided, however, that nothing herein shall be construed to impair any valid subsisting contract

now in existence between any municipality and any such company."

The Act of August 18th, 1919, page 94, amended Code Section 2662 by adding at the end thereof the following provision, to-wit:

"Provided that the above proviso, to-wit: 'that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company,' shall not apply to any suburban and street railroad company which has its principal office and operates lines of railroads in counties having a population of not less than 75,000 and not more than 125,000 population."

In the mandamus case, and in the case at bar, the railway companies contended that the fixing of rates by the Commission would not impair the obligations of the contract, because under the decisions of this Court, the changing of contract rate by the Commission would not impair the obligations of such contract, even though the contract had been made prior to the statute creating the Commission.

Producers Trans. Co., vs. Railroad Commission of Cal.,  
251 U. S. 228, 232.

City of Englewood vs. Denver S. P. Ry Co., 248 U. S.  
294.

The State Court held, however, that the claimed contract provision deprived the Commission of jurisdiction to fix rates in Decatur on the North Decatur line.

Georgia Railway & Power Company vs. Railroad Commission of Georgia, 149 Ga. 1.

The fixing of the street railway fares, falling under the jurisdiction of the Railroad Commission, after that decision

caused the discrimination and illegality of the North Decatur rate.

It is immaterial whether the Act or the proviso or exceptions to the Act was or was not considered constitutional when the Act was passed. The Act or the proviso may become unconstitutional as the result of future developments, or the method of enforcing it, or future construction of the Act by the highest State Court.

Municipal Gas Co. vs. Public Service Commission, 225 N. Y. 89, 121 N. E. 772.

Castle vs. Massa, 91 Ohio State, 296, 110 N. E. 464.

Taking the State Court's construction there is no legal or reasonable classification as to the contracts excepted and those placed under the Railroad Commission's jurisdiction. Reasonable classification does not deny equal protection of the law, but one based on no adequate reason is invalid.

Kansas City So. Ry. Co. vs. Road District, 256 U. S. 658.

The Act as thus amended, and as construed by the State Court, only excepted from the Commission's jurisdiction rate provisions as to fares made prior to 1907 by a municipality (not for itself but for individuals) where the street railway company has its principal office and operates lines of railroad in counties having a population of less than 75,000 and more than 125,000.

It conferred jurisdiction upon the Commission to change or alter rates though fixed in any other contracts, whether made prior or subsequent to 1907. It is, therefore, evident that the Legislature did not undertake to make a classification based on the time of the execution of the contract.

It did not undertake to make a separate classification of municipal contracts for some made prior to 1907, and all made subsequent thereto are placed under the Commission's jurisdiction.

It included under the Commission's jurisdiction all rate contracts made by individuals for themselves.

Union Dry Goods Co. vs. Public Service Corporation,  
142 Ga. 841, 846.

When the Act gave the Commission jurisdiction to change rates fixed in contracts made by individuals for themselves, it could not except from the Commission's jurisdiction a similar rate contract made by a municipality for other individuals.

No legal or reasonable classification exists as to municipal rates, merely because the principal office of the street railway company may happen to be located in a county having under 75,000 or over 125,000 population, and those whose principal office is located in a county having a population between 75,000 and 125,000; the first being held as being excluded from the jurisdiction of the Commission and the latter as included.

The Act of 1907, with its proviso, as construed by the State Court, makes no reasonable classification as to rate contracts; the Act and the orders of the Commission establish a discriminatory scheme of rates and recognizes no distinction as to the Commission's power to regulate the quality and quantity of service, whether the rate for the service is placed within or without the Commission's jurisdiction.

Lake Shore & Michigan So. Ry. Co. vs. Smith, 173 U. S. 684.

Chicago, R. I. & P. Ry. Co., vs. Ketchum, 212 Fed. 896.

Leonard vs. Am. Life & Annuity Company, 139 Ga. 274 (5); 277 (5).

Traux vs. Corrigna, 257 U. S. 312.

When the Legislature is empowered to place all rate contracts under the Commission's jurisdiction it cannot place some and except others within the same class and relating to the same service, without rendering said Act unconstitutional and violative of the Fourteenth Amendment of the Constitution of the United States.

Cotting vs. Goddard, 183 U. S., 79.

Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150, 165.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 539, 556.  
Yick Wo vs. Hopkins, 118 U. S. 356.

Louisville & N. R. Co. vs. Railroad Commission of Tenn., 19 Fed. 697.

Western Ry. of Ala. vs. Railroad Commission of Ala., 197 Fed. 954 (5 and 6), page 973.

#### **SUB-PARAGRAPH (C) OF THE THIRD ASSIGNMENT OF ERROR.**

This assignment attacks the Act of 1907, as establishing a discriminatory scheme of rates as against the intervenors, the case supra controlling on this assignment of error.

#### **SUB-PARAGRAPH (B) OF THE THIRD ASSIGNMENT OF ERROR.**

(Record, page 7, this brief page 17 supra). Now the State Court holds that the Act of 1907 supra withholds from the Commission any authority to change the rate of fare

of 1903, but that said Act conferred on the Commission authority to increase the quantity and quality of service rendered thereon. That under the said Act as Commission (a) can require the issuance of free transfers; (b) make the rate operative from all parts of Decatur to all points in Atlanta; (c) increase the quality and quantity of service; although it could not change the 5 cents fare. These orders of the Commission greatly increased the cost of the North Decatur service, so as to make the actual cost 9.29 cents per passenger. Such orders unconstitutionally confiscate the property of the street railway companies.

Mississippi R. R. Com. vs. Mobile R. Co., 244 U. S. 388.

Washington & P. C. Ry. Co. vs. Magruder, 198 Fed. 218 (3, 4).

Giving such construction and effect to this Act, is unconstitutional.

Detroit Union Ry. Co. vs. Michigan, 242 U. S. 238.

#### IV. AND V.

#### FOURTH AND FIFTH ASSIGNMENTS OF ERROR.

(Record p. 8, in this brief, pages 18, 19.)

The State Court held that the rate provision of the ordinance of 1903 was a valid and binding contract, and taken as such it suspended, during the life of the contract, all governmental powers which affect the rate of fare in question.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

No obligation whatever is found in the College Park ordinance (Discussed in case No. 464) requiring the giving of transfers.

The orders of the Commission of April 2nd, 1919, requiring free transfers on payment of a five cents fare, unconstitutionally impaired the obligations of that contract.

Detroit United Ry. Co. vs. Michigan, 248 U. S. 429, 436, 437.

The ordinance in this case (while mentioning transfers) does not cover the fare to be paid to obtain a transfer. (Record page 166). The order of the Commission of September 22nd, 1920, required an increase in the quantity and quality of service not provided for in the contract. (See order record page 244; 245). Each of these orders of the Commission are violative of Article 1, Section 10, of the Constitution of the United States.

These orders of the Commission were passed under and by virtue of the Legislative Act of the State of Georgia (Acts 1907, page 73 et seq.)

The judgment of the court in sustaining the general demurrers to the answers and cross bills as amended gave effect to the said orders of the Commission, and to the Act under which it was held that the Commission had jurisdiction to pass such orders.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238.

Louisiana Ry. Co. vs. Behrman, 235 U. S. 164, 170.

Mississippi Railroad Commission vs. Mobile R. Co., 244 U. S. 388.

Washington & P. C. Ry. Co. vs. Magruder, 198 Fed. 218 (3, 4).

## VI.

**SIXTH ASSIGNMENT OF ERROR**

The assignment of error here raised also attacks the Acts of the State of Georgia (Georgia Laws 1914, page 703, and 1916, page 681), in that said Acts unconstitutionally impair the obligations of the contract of 1903 and impairs the previous contract entered into between the County of DeKalb and the electric company.

When the fare contract of 1903 was entered into, only a small part of the North Decatur line was situated in Decatur. Giving that contract its widest construction it only applied to that part of the line **then** within the corporate limits of the municipality.

The Acts of 1914 and 1916 (Georgia Laws 1914, page 703, and 1916, page 681) extended the limits of Decatur toward Atlanta, taking in about a mile of the North Decatur line theretofore built under the contracts with the county of DeKalb.

The action of the Court in sustaining the demurrer and its refusal to give written request to charge (page 30 of the Record) made applicable the 5 cents fare to this annexed territory.

The judgment of the Court below requiring 5 cents rate of fare over this portion of the line rests under these Acts extending the territory. It follows, therefore, that these Acts, and the effect given to them, impair the contract of the Street Railway Company with the County of DeKalb, and also adds to the burden of the contract of 1903, in violation of Article 1, Section 10 of the Constitution of the United States.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238.

United States vs. Memphis, 97 U. S. 284.

It is not necessary that the State Court's decision mention said Acts since its decision gave effect to them.

Houston vs. Texas C. Rd. Co., 177 U. S. 66, 67.

*Established by G. V. S. C. (No. 217) - decree of  
Court of 8th Jy 1923 VII.*

#### SEVENTH ASSIGNMENT OF ERROR.

(Record page 9, 10; page brief 21). In the answers and cross bills as amended there was an express offer to surrender all the rights and privileges as to the North Decatur line within the corporate limits of the municipality, if the fare provision of 1903 was held to be legal and enforceable. This 5 cents fare is confiscatory in that it deprives the Street Railway Company of a fair return on its property used in furnishing the service and pays only about one-half the operating cost of furnishing said service.

It is contended that if the rate provision could not otherwise be repudiated, the street railway had the right to surrender and forfeit its privilege of operating said line within Decatur.

Therefore, the street railway desired to surrender all its rights within the municipality, and asked that it be allowed to cease operations thereon.

A public utility corporation has the right to surrender its franchise within a municipality.

Fletcher on Corporations, Section 1777, page 2130.

Fletcher on Corporations, Section 4425, page 7718.

There is no provision in the claimed contract between the railway company and Decatur that the Street Railway Company is perpetually to operate its lines in Decatur. If there had been it could have been terminated under the facts set out in the answers and cross bills as amended.

Texas & P. Ry. Co. vs. City of Marshall, 136 U. S. 393.

The Street Railway Company cannot be compelled to perpetually carry North Decatur traffic at a loss.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113.

Brooks-Scanlon Co. vs. R. R. Com. of La., 251 U. S. 291; 399.

North. Pac. Ry. Co. vs. North Dakota, 236 U. S. 585.

Norfolk & Western Ry. Co. vs. West Virginia, 236 U. S. 605.

The deficiency could not legally be made up by increasing the fare to be charged other passengers of the Street Railway Company.

Vandalia R. R. vs. Schnull, 255 U. S. 113.

The Railroad Commission cannot increase the quantity and quality of North Decatur service, and put the cost of such service upon other patrons, or upon intervenors, for that would be compelling them to pay a higher rate for their

service, and their property would be unconstitutionally confiscated.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 113, 118.

Respectfully Submitted,

L. Z. ROSSER,  
J. PRINCE WEBSTER,  
WALTER T. COLQUITT,

Attorneys for Plaintiffs in Error  
and  
Petitioners in Certiorari.

Atlanta, Ga., March 17, 1923.

No. **463**

Office Supreme Court  
FILED  
JUL 11 1921  
WM. R. STANSE  
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921

GEORGIA RAILWAY & POWER COMPANY, ET AL.

*Petitioners*

*vs.*

TOWN OF DECATUR,

*Respondent*

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PETITION FOR CERTIORARI  
BRIEF AND MOTION

LUTHER Z. ROSSER

J. PRINCE WEBSTER

WALTER T. COLQUITT

*Attorneys for Petitioners*

IN THE  
Supreme Court of the United States  
October Term, 1921

GEORGIA RAILWAY & POWER  
CO., GEORGIA RAILWAY &  
ELECTRIC CO., R. C. HACK-  
MAN, C. H. KNOX, G. R. Mac-  
NAMARA, J. T. BRASWELL, C.  
A. VIRGIN, J. D. MALSBY, C. M.  
BINDER, J. L. MURPHY, J. R.  
HARDIN, H. M. ASHE, P. E.  
DAVIS, C. E. BENNETT, W. E.  
FIELD, H. E. HAWN, DAVID  
HAWN, F. McDONALD, JR., and  
J. C. GORMAN,

Petitioners

vs.

TOWN OF DECATUR,  
Respondent.

TO THE HONORABLE THE CHIEF JUSTICE  
AND THE ASSOCIATE JUSTICES OF THE  
SUPREME COURT OF THE UNITED STATES  
OF AMERICA:

The petition of Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David

Hawn, F. McDonald, Jr., and J. C. Gorman, respectfully shows:

1.

The Town of Decatur (a municipal corporation of the State of Georgia) brought an equitable petition against Georgia Railway & Power Company, individually and as lessor of Georgia Railway & Electric Company, seeking to enjoin the street railway companies from increasing fares, as to the North Decatur line, of passengers boarding or alighting from cars within the corporate limits of the town of Decatur, from five cents per passenger to seven cents per passenger, claiming that:

(a) All lines of street railways had been placed under the jurisdiction of the Railroad Commission by the act of the Georgia legislature of 1907, with the exception stated in the following proviso: "Provided, however, that nothing herein shall be construed to impair any valid, subsisting contract now in existence between any municipality and any such company."

(b) That on the — day of April, 1918, the Railroad Commission of Georgia declared its lack of jurisdiction to fix fares upon all of the lines of said street railway companies, including the North Decatur line, upon the ground that the lines of said companies fell within the proviso of the act of 1907, *supra*.

(c) That said railway companies, by mandamus proceedings in the Supreme Court of Georgia, reversed this ruling of the Railroad Commission,

directing them to fix fares upon all of the lines of said companies except as to that part of the College Park line included within the corporate limits of the City of College Park and that part of the North Decatur line situated within the corporate limits of the Town of Decatur. (149 Ga. 1.) This exemption was based upon the ground that the City of College Park and the Town of Decatur had contracts falling within the proviso of the act of 1907, *supra*.

(d) That by reason of the allegations *supra* (a) to (c) inclusive the Town of Decatur had a valid perpetual contract by which said street railway companies were never to charge passengers on the North Decatur line, alighting from or boarding cars within the corporate limits of the Town of Decatur, more than five cents per passenger.

## 2.

Respondent further sought to enjoin the street railway companies from discontinuing the giving of transfers on the North Decatur line to passengers boarding cars within the limits of the Town of Decatur for all other lines of railway in the City of Atlanta, claiming that it has always been the custom of said railways to give transfers under certain conditions to passengers on their other lines, and that the Railroad Commission had, on April 19, 1919, ordered the railway companies to continue issuing transfers to patrons on the North Decatur line within the limits of the Town of Decatur, just as they were issued to patrons on other lines of said companies.

3.

The fact that said railway companies had notified respondent that they would increase fares to seven cents on October 10, 1920, was given as the immediate need for the injunction.

4.

The railway companies showed cause and defended by answers and demurrers, substantially as follows:

- (a) The railway companies furnished the railway system for the City of Atlanta and vicinity, 157 miles of their railway being in the City of Atlanta; their full mileage being 212 miles of single track.
- (b) That the North Decatur line, 5.93 miles in length, begins in the City of Atlanta at corner of North Pryor and Edgewood Avenue; and runs over various streets of the city, both in Fulton and DeKalb Counties, to what was formerly the Town of Edgewood, to the corporate limits of the city; thence over a private right of way to the corporate limits of the Town of Decatur, as they existed prior to 1914, a distance of 5.424 miles; thence the line makes a loop in the Town of Decatur, coming back to the main line from Atlanta at McDonough Street. Said street railway companies also own another line between Atlanta and Decatur, known as the South Decatur line, which runs along the South side of the Georgia Railroad practically parallel to, and but a short distance from, the North Decatur line, which runs North of the Georgia Railroad; the terminii

these two lines, both in Decatur and in Atlanta, being very near together.

(c) That prior to the 2nd day of April, 1919, and prior to the rendition of the decision in 149 Ga. 1, said street railway companies charged a uniform fare of five cents per passenger, with transfers upon uniform conditions.

(d) On said last named date the Railroad Commission of Georgia, after a full hearing, increased the rate of fare to six cents per passenger, except as to the College Park line within the limits of College Park and the North Decatur line within the limits of Decatur. After this order of the Commission a six-cents fare was charged upon all the street railway lines except those stated.

(e) On September 22, 1920, the Georgia Railroad Commission, upon further hearing, fixed a seven-cents fare on all lines of the railway companies except as to College Park and the North Decatur line, as above stated. In rendering this seven-cents order, the Commission said:

"The five-cent fare now in effect on the Main Decatur and College Park lines, contracted for under vastly different conditions than now exist, are not fairly compensatory, and, as to the patrons of the company on other routes, are discriminatory. This Commission is without authority to increase them."

In the same order, said Commission increased both

the quantity and quality of service to be rendered the North Decatur traffic.

(f) That the ordinance of March, 1903, if valid as a contract and binding upon the railway companies, provides for a five-cents fare only upon the North Decatur line for one passenger and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the Terminus of the same line in the Town of Decatur, and the trip either way shall include the entire loop in the town of Decatur, and from no other point in the Town of Decatur, and from no other point in the City of Atlanta, or elsewhere, to any other point in the Town of Decatur.

(g) That if the fare provision in the ordinance of March, 1903, be construed as an ordinance regulating and fixing fares, or be construed as a contract for fares, it is void in either instance because of lack of authority in the Town of Decatur to make such contracts or pass such ordinances, and for lack of authority in the street railway companies to make such contracts.

(h) If the rate ordinance above referred to be construed as a contract, and as valid in its inception, it was terminated by the notice given by the railway companies; and it is discriminatory in that it discriminates in favor of all passengers boarding or alighting from the cars on the North Decatur line within the limits of the Town of Decatur; those so boarding and alighting being charged only five cents, and all other passengers on the North Decatur line being charged seven cents; and it was further

illegal at its inception, not only for lack of statutory authority to make the contract but as being in violation of Sections 6389, 6464 and 6467, of the Code of 1914 of the State of Georgia.

(i) If said rate ordinance is construed to be a contract, it has been revoked by the State of Georgia, through the Railroad Commission of said State, by adding to the contract by increasing the quantity and quality of service to be performed under said claimed contract.

(j) By the acts of the legislature (Acts 1914, p. 703, and Acts 1916, p. 681), the corporate limits of the Town of Decatur were extended towards the City of Atlanta, so as to include a part of the North Decatur line built upon the private way of the railways, and which was, therefore, not included in the rate ordinance of 1903.

(k) Under the Constitution of the State of Georgia, the General Assembly may not authorize the construction of any street passenger railway within the corporate limits of any town or city without the consent of the municipal authorities. The North Decatur line was originally constructed under the consent, or franchise, of the City of Atlanta, the Town of Edgewood, the Town of Kirkwood, and the County of DeKalb. In none of these franchises was there any provision for a five-cents fare.

(l) The cost of the service to patrons boarding or alighting from cars on the North Decatur line within the corporate limits of the Town of Decatur is 13.956 cents per passenger, and said service is not,

and never will be, within the five cents now charged.

(m) On October 5, 1920, the street railway companies notified the Town of Decatur that from and after October 20, 1920, the claimed five-cents fare provision of the ordinance of March, 1903, would be terminated.

(n) The rate provision of the ordinance of 1903 confiscates the property of the railway companies and is, therefore, unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States, in that it deprives the street railway companies of their property without due process of law, and denies to all patrons of said railway companies, except the North Decatur patrons, including the intervenors herein, the equal protection of the laws, in that the North Decatur patrons pay five cents and all the other patrons pay seven cents.

The legislative act of the State of Georgia (Acts 1907, page 73, et seq.), amended by the Act of August 18, 1919 (Acts 1919, page 94), is unconstitutional and violative of the Fourteenth Amendment to the Constitution of the United States, in that it denies to each of petitioners the equal protection of the laws and fixes a discriminatory and illegal scheme of rates, in that said act places under the jurisdiction of the Railroad Commission of Georgia the authority to change rates fixed in all contracts except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway company having its principal office and operating lines of railroad in counties having a population of more than 75,000 and less than 125,000.

It further violates the Fourteenth Amendment to the Constitution of the United States by depriving the petitioning railways of their property without due process of law, in that it deprives the Railroad Commission of the power to change rates as just above stated, and confers upon said Commission the power to increase the quality and quantity of service rendered and the power to command the issuance of transfers by said railway companies.

(o) The Act of 1907 (Acts 1907, page 73, et seq) violates the Fourteenth Amendment to the Constitution of the United States in that under and by virtue of said act, power and authority are conferred upon the Railroad Commission of Georgia to fix a seven-cents rate of fare for a less or similar service rendered to all other persons and patrons, and a five-cents rate of fare for North Decatur patrons for a greater and similar service.

(p) If the rate provision of the ordinance of 1903 is a contract between the Town of Decatur and the street railway companies, then the Act of 1907 (Acts 1907, p. 73 et seq.), when construed as permitting the Railroad Commission of Georgia to add to the contract by increasing the quantity and quality of service, impairs the obligations of the contract between the parties, in violation of Article 1, Section 10, of the Constitution of the United States.

(q) If the rate provision of the ordinance of 1903 be held by the Court to be a contract, then the Court should further hold that the act of 1907 (Acts 1907, p. 73 et seq.) and the orders of the Commission

making the five-cents fare provision operative on the North Decatur line from points in Atlanta other than from the terminus of the North Decatur line to the Town of Decatur, and from points in Decatur other than the terminus of said line to the City of Atlanta, then said Act and orders impair the obligations of said contract, in violation of Article 1, Section 10, of the Constitution of the United States.

(r) If the fare provision of the ordinance of 1903 constitutes a contract, and if the acts of 1914 and 1916, supra, increasing the limits of the Town of Decatur, have thereby added to the five-cents zone, then said Acts violate Article 1, Section 10, of the Constitution of the United States: (1) In that they extend the five-cents fare provision of the contract to territory added to the Town of Decatur after the execution of the contract; (2) in that the County of DeKalb granted a franchise to the railway companies, under and by virtue of which the railway tracks of said companies were laid in the public roads of DeKalb County (now included in the corporate limits of Decatur), under which the fares to be charged to patrons were not limited.

## 5.

The street railway companies prayed for and requested the power to abandon so much of their North Decatur line as was located in the Town of Decatur, because the operation of said line cost more than thirteen cents per passenger, and to be compelled to continue to operate said line confiscated their property, contrary to the Fourteenth Amendment to the Constitution of the United States.

6.

The individual petitioners were allowed to intervene as parties defendant. They adopted the answers and demurrers of the street railway companies, and prayed a cessation of the discrimination against themselves, and specifically raised the constitutional question, contending that enforced compliance with the ordinance of 1903 violated the Fourteenth Amendment to the Constitution of the United States as to them, in that it denied them and all other persons on the North Decatur line, except those boarding or alighting from cars within the Town of Decatur, the equal protection of the laws as therein guaranteed, in that they and others like situated were charged a fare of seven cents, while the North Decatur line patrons paid only five cents.

7.

A preliminary injunction was granted in the court below, taken up by writ of error to the Supreme Court of the State of Georgia, and the judgment of the court granting the restraining order was sustained.

8.

Thereafter final trial was had, and upon motion the trial court struck the answers and cross-bills of petitioners on general demurrer, and directed a verdict in favor of respondent, entering thereupon a decree in its favor. The effect of such decree was to sustain as legal and binding, with which compliance must be had, all the orders of the Commission and

the acts of the State attacked in the answers and cross-bills; it enforced compliance with the provisions of the ordinance of 1903, with the various acts of the State and with the orders of the Commission enlarging and extending such contract by increasing the quality and quantity of the service, and by enlarging and extending the territory to which the five-cents fare provision was to apply, and denied the right of petitioning street railway companies to give up their North Decatur franchise rights in the Town of Decatur and to cease further operation of their North Decatur line in the Town of Decatur.

9.

Petitioners submit the following reasons why the writ of certiorari should be allowed:

(a) The ordinance of 1903 is not a rate contract. It is neither in form nor substance a contract, but is an attempted ordinance which the Town of Decatur had no right to pass, seeking to regulate rates. Neither the Town of Decatur nor the street railway companies had the statutory power to make rate contracts, and had the statutory power been given them such statutes would be void, for under the Constitution of the State of Georgia the legislature alone can make rates. The legislature itself cannot make an irrevocable grant of special privileges and immunities. "The exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a way as to infringe the equal rights of individuals, or the general wellbeing of the State."

Grant that the contract was valid at its inception, it was at most a contract at will and subject to be terminated upon reasonable notice.

When the Railroad Commission increased the fares on every other part of the street railway system to six, and then seven, cents, it became discriminatory, and hence illegal. It is not contended that the State could not have revoked it at any time. Without dispute, the State did so modify it as that the petitioning railways were released from the contract, by the Commission's increasing and enlarging the quality and quantity of the service to be performed under the contract and by extending the area covered by the contract.

It is true that the Supreme Court of Georgia held that this ordinance was not a rate ordinance but a rate contract, and a valid contract. When the Fourteenth Amendment to the Constitution of the United States is appealed to, it will be determined by this Court whether the confiscatory instrument is, in fact, a rate ordinance or a rate contract. If this question is to be determined exclusively by the State Courts, then in a large measure of instances the State will for itself pass upon the Fourteenth Amendment.

(b) The enforcement of the rate ordinance of 1903 discriminates against the individual intervenors and, as to them, violates the Fourteenth Amendment to the Constitution of the United States, in that it denies to them the equal protection of the laws. They live either on the North Decatur or

South Decatur line, between the corporate limits of Atlanta and the corporate limits of the Town of Decatur. All of them pay a seven-cents fare, many of them for very short distances; the North Decatur line patrons pay five cents for the longest haul on the line.

(c) The legislative act of 1907 (Acts 1907, p. 73 et seq.), as amended in 1919, as construed by the court violates the Fourteenth Amendment to the Constitution of the United States as to all of the petitioners, in that it denies to them the equal protection of the laws and fixes a discriminatory and illegal scheme of rates. The act places under the jurisdiction of the Railroad Commission of Georgia all street railways in said State and under its terms the Commission can disregard all rate contracts in the State except valid, subsisting contracts in existence on August 23, 1907, between any municipality and any street railway having its principal office and operating lines of railroad in counties having a population of less than 75,000 and more than 125,000. This character of contract here excepted is beyond the reach and power of the Commission, no matter all other contracts, it may disregard them and fix such rates as to it may seem just and fair.

Under its operation, citizens of the Town of Decatur, on the North Decatur line, ride for five cents, when the service costs more than thirteen cents. Other citizens on the same line enjoy a much less service, but are charged seven cents. An act which establishes a scheme of rates permitting such

inequality between patrons cannot be justified by any fair system of classification.

As construed by the Court, under this act, while the Commission may not change the contract as to the rate of fare, it is here so construed by the Court as to permit the Commission to change the excepted municipal contract by adding to its terms a provision increasing the quality and quantity of service anticipated in the terms of the contract. So construed by the court, said act violates the Fourteenth Amendment to the Constitution of the United States in that it takes the property of the railway companies without process of law.

Said act, as to the individual petitioners, fixes an illegal and discriminatory scheme of rates, in violation of the Fourteenth Amendment to the Constitution of the United States, in that the court held that under said act the Railroad Commission had the power to fix a seven-cents rate of fare for petitioners and others similarly situated, while a five-cents fare for a greater service is permitted to the North Decatur line patrons.

If the court correctly held that the rate ordinance of 1903 was a valid contract between the parties, then the legislative act of 1907 (Acts 1907, p. 73 et seq.), as construed by the court, violates Section 10, Article 1, of the Constitution of the United States. That act permits the Railroad Commission to add to the contract by increasing the quality and quantity of service as contemplated by said contract; said ad-

dition and increase being an impairment of the obligations of said rate contract.

Since the court held that the rate ordinance of 1903 was a valid and binding contract between the parties, then said Act of 1907 (Acts 1907, p. 73 et seq.), as construed by the court, violated Article 1, Section 10, of the Constitution of the United States, in that said Act permitted the Railroad Commission of Georgia to enforce a five-cents fare not only from the terminus of the North Decatur line in Atlanta to the terminus of the same line in Decatur, and from the terminus of said line in Decatur to its terminus in Atlanta, but from all points in Decatur to all points without the Town of Decatur, and from all points without to all points within the town of Decatur.

In the years 1914 and 1916, after the passage of the ordinance of 1903, the legislature enlarged the area of the Town of Decatur, extending it towards the City of Atlanta, and taking in a section of the North Decatur line not theretofore included within the limits of Decatur. The court construed said enlarging acts so as to bring the new territory under the provisions of the rate ordinance of 1903. If such rate ordinance was, in fact, a rate contract, the construction of said enlarging acts, so as to add new territory to the provisions of that contract, impaired the obligations of the contract, in violation of Article 1, Section 10, of the Constitution of the United States.

(d) The petitioning railway companies built their tracks upon the public roads of DeKalb County,

under a franchise contract with that County wherein there was no five-cents fare provisions. When the court so construed the enlarging acts of 1914 and 1916 as to apply the rate ordinance to the added territory, it so construed it as to impair the obligations of the contract between said railway companies and the County of DeKalb, in violation of Article 1, Section 10, of the Constitution of the United States.

In the cross-petition, the petitioning street railway companies, setting up that the service to each North Decatur line patron, under the rate ordinance of 1903, cost the companies more than thirteen cents, prayed that they be allowed to relinquish their franchise in the Town of Decatur and take up their tracks from its streets. The court, with the dismissal of the cross-bill, denied this right, holding that under their charters and the rate ordinance, they were bound to continue the North Decatur service, even if the result was a confiscation of their property. It is contended that, as construed by the court, the ordinance of 1903 is in violation of the Fourteenth Amendment to the Constitution of the United States. Under the provision of the Constitution, a corporation cannot be forced to dedicate its property to the public service to the destruction of its property.

## 10.

Petitioners further submit that this case is of great importance to the petitioning railway companies and the individual petitioners, involving a question of confiscation of the property of the public

utilities and gross discrimination against the individual petitioners.

WHEREFORE, your petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Georgia, to the end that the judgment and decree of the Supreme Court of Georgia may be reviewed and reversed by this Honorable Court.

LUTHER Z. ROSSER,  
J. PRINCE WEBSTER,  
WALTER T. COLQUITT,  
Attorneys for Petitioners.

#### GEORGIA,—FULTON COUNTY.

Before me personally appears Walter T. Colquitt, who, being duly sworn, deposes and says that he is counsel for the petitioners, Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. McDonald, Jr., and J. C. Gorman; that he knows of the proceedings had, and that the facts stated in the foregoing petition are true and correct, to the best of his knowledge and belief.

WALTER T. COLQUITT.

Sworn to and subscribed before me, this  
26th day of June, 1922.

INEZ BOINEST,  
Notary Public, Fulton County, Georgia.

GEORGIA RAILWAY & POWER  
CO., GEORGIA RAILWAY &  
ELECTRIC CO., R. C. HACK-  
MAN, C. H. KNOX, G. R. Mac-  
NAMARA, J. T. BRASWELL, C.  
A. VIRGIN( J. D. MALSBY, C. M.  
BINDER, J. L. MURPHY, J. R.  
HARDIN, H. M. ASHE, P. E.  
DAVIS, C. E. BENNETT, W. E.  
FIELD, H. E. HAWN, DAVID  
HAWN, F. McDONALD, JR., and  
J. C. GORMAN,

Petition for  
Certiorari.

Petitioners,

vs.

TOWN OF DECATUR,  
Respondent.

TO THE TOWN OF DECATUR, AND J. HOWELL  
GREEN AND FRANK HARWELL, ITS ATTOR-  
NEYS OF RECORD:

This is to notify you, and each of you, that the above named Georgia Railway & Power Company, Georgia Railway & Electric Company, R. C. Hackman, C. H. Knox, G. R. MacNamara, J. T. Braswell, C. A. Virgin, J. D. Malsby, C. M. Binder, J. L. Murphy, J. R. Hardin, H. M. Ashe, P. E. Davis, C. E. Bennett, W. E. Field, H. E. Hawn, David Hawn, F. MacDonald, Jr., and J. C. Gorman, petitioners for certiorari, will on the 17th day of July, 1922, upon their verified petition and copy of the entire record in this case, at the opening of Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of

the petition for writ of certiorari and brief in support of same are herewith delivered to you) to the Supreme Court of the United States in its court-room at the Capitol, in the City of Washington.

**LUTHER Z. ROSSER,  
J. PRINCE WEBSTER,  
WALTER T. COLQUITT,**  
Attorneys for Petitioners.

IN THE SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM 1921

GEORGIA RAILWAY & POWER }  
CO., GEORGIA RAILWAY & }  
ELECTRIC CO., and R. C. HACK- }  
MAN, C. H. KNOX, G. R. MAC- }  
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HAWN, F. McDONALD, JR., and }  
J. C. GORMAN,

Petitioners.

Vs.

TOWN OF DECATUR,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR  
CERTIORARI.

A full statement of the case appears in the petition for certiorari.

This case is already pending in this Court on writ of error.

Under a number of decisions of this Court, had the case arisen prior to the Act of Congress of Sep-

tember 16, 1919, amending Judicial Code 230, (changing the procedure in bringing certain questions to this Court from writ of error to certiorari) a writ of error would lie. The change in procedure made by this Act and subsequent decisions of this Court, leave counsel for petitioners in doubt as to which remedy should be followed; and they, therefore, respectfully request that the certiorari be sanctioned as prayed, so that the questions raised may be considered and determined by this Court.

FEDERAL QUESTIONS RAISED WHETHER OR  
NOT RATE PROVISION IS HELD TO BE  
A CONTRACT

Whether the rate provisions of the ordinance of to wit, March 3, 1903, and the acceptance thereof on April 1, 1903, is held to be a binding rate contract, or merely a rate ordinance, federal questions, for judicial determination by this Court, are raised.

If it is held to be a contract the constitutional question is raised that subsequent statutes of the State of Georgia and orders of the Railroad Commission of Georgia unconstitutionally impair its obligations in violation of Article 1, Section 10 of the Constitution of the United States.

If it is held to be a rate ordinance then constitutional questions are raised, that it violates the 14th Amendment of the Constitution of the United States; for the 5 cents rate provision therein contained is admittedly confiscatory and discrimina-

tory; and has been expressly so held and declared by the Railroad Commission of the State of Georgia.

This is a typical case for the exercise of the jurisdiction of this Court under a long line of decisions.

When the contract clause of the United States Constitution is invoked, this Court determines for itself (1) Is there a contract? (2) If so, what obligation arose from it? (3) Has that obligation been impaired by subsequent legislation?

Detroit United Railway Co. vs. Michigan, 242 U. S. 238, 249.

Milwaukee Electric Ry. Co. vs. Wisconsin, 252 U. S. 100, 103.

Stearns vs. State of Minnesota, 179 U. S. 223, 232.

This Court determines the question of whether or not there is a contract, for itself, and in deciding it may even reverse the State court's construction of the State Constitution.

University vs. People, 99 U. S. 309, 323.

The reason for this rule, as stated by this Court, is that an erroneous decision by the State Court might defeat the federal jurisdiction and absolutely deprive a party of a constitutional right guaranteed to him by the Constitution of the United States.

Similarly, when the 14th Amendment of the Constitution of the United States is invoked against an

ordinance, confessedly discriminatory and confiscatory and the claim is made that it is binding as a contract, this Court has the jurisdiction to determine for itself whether there is a contract, its meaning, validity and extent, and if held to be a mere ordinance or legislative act, whether its discriminatory or confiscatory character violates the 14th Amendment of the Constitution of the United States. Otherwise, a State court (similarly as when the impairment of a contract clause of the United States Constitution is invoked) by holding an ordinance or statute to be a contract might absolutely deprive a party of the constitutional guarantee against the confiscation of his property, and securing the equal protection of the law.

San Antonio vs. San Antonio Pub. Service Co.,  
255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

As the impairment of the obligation of the contract clause of the United States (Article 1, Section 10) is invoked and questions as to the violation of the 14th Amendment of the Constitution of the United States are raised, the federal question is made as to whether or not the rate provision of the ordinance of March 3, 1903, and the acceptance thereof on April 1, 1903, is or is not a contract.

The determination of this question is, in and of itself, a federal question.

Hoadley's Administrator vs. San Francisco,  
124 U. S. 639, 645.

## CONTENTION THAT RATE PROVISION IS NOT A CONTRACT.

To show that under the decisions of this Court a substantial federal question is raised; that the rate ordinance of March 3rd, 1903, and the acceptance thereof on April 1, 1903, is not a contract, we briefly call attention to some of the decisions of this Court sustaining the contention of petitioners that no binding rate contract exists.

As the parties to the claimed rate contract have no explicit, express or implied constitutional or legislative authority to make binding rate contracts, the ordinance is not a contract.

Home Tel. & Tel. Co. vs. Los Angeles, 211 U. S. 265.

Milwaukee Elec. Ry. Co. vs. Wisconsin, 238 U. S. 174.

City of Englewood vs. Denver A. S. P. Ry. Co., 248 U. S. 294.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Southern Iowa Elec. Co. vs. Chariton, 255 U. S. 539.

Georgia Constitutional provision (Code Section 6389) forbidding making irrevocable grants of special privileges or immunities, prevents the ordinance from being a contract.

San Antonio vs. San Antonio Pub. Service Co., 255 U. S. 547.

Similarly, Georgia Constitution provision (Code Section 6464)—“the exercise of the police power of the State shall never be abridged, nor so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals, or the general well-being of the State,” prevents ordinance from being a rate contract.

O'Keefe vs. City of New Orleans, 273 Fed. Rep. 560.

State action subsequent to March 3rd, 1903, and April 1, 1903, made the rate provision illegal and unenforceable. Action by the State of Georgia, through the Railroad Commission of the State of Georgia, subsequent to March 3rd, and April 1, 1903, renders the rate provisions discriminatory and violative of the constitutional provisions of the State of Georgia (Code Section 6463) prohibiting unjust discrimination, and Code Section 6467 and 6469 making discrimination (directly or indirectly) exercised by a Railroad Company unconstitutional and void.

Rate provision is now unenforceable under the general principles of law and under the 14th Amendment of the United States Constitution in that it and the rates established by the State of Georgia over other portions of the same line have the effect of establishing two different rates over the same line, charging Decatur patrons a lesser fare for the greater or similar service under the rate provision of March 3, 1903, and April 1, 1903, than charged other patrons for the same or less service, under the State fixed rates.

As held by this Court in 194 U. S. 517, the enforcement of two such different rates over the same line lead to consequences dangerous to the public interest, peace and tranquility, the extent of which it is difficult to perceive.

Discriminatory rate contracts always and everywhere void and unenforceable.

Portland Railway & Light Co. vs. Oregon, 229 U. S. 397.

Portland Railway & Light Co. vs. Oregon, 229 U. S. 414.

Such being the evil effect of the further performance of the rate provision of March 3, 1903, and acceptance thereof on April 1, 1903, under the decisions of this Court it has either been sufficiently performed as a contract, or it has been terminated by the Railway Company by notice.

Texas, etc., Ry. Co. vs. Marshall, 136 U. S. 393.

It is held by the State court that the State, at any time, can terminate or confer power upon the Railroad Commission to change the rate provision in question. As such provision is not binding on the State it is unilateral and being confessedly confiscatory and discriminatory cannot be enforced against the street railway companies, and the individual intervenors.

Central Power Co. vs. City of Kearney, 274 Fed. Rep. 253 (2) and cases cited.

San Antonio vs. San Antonio Pub. Service Co.,  
255 U. S. 547, 558.

It has been terminated as a contract by notice, as the rate provision contained no specific time it was to continue.

Jones vs. Newport News, 65 Fed. 736.

City of Utica vs. Cons. Water Co., 179 Fed. 875.

Western Union Tel. Co. vs. Pennsylvania Co., 125 Fed. 67.

Texas & P. Ry. Co. vs. Scott, 77 Fed. Rep. 726.

If the Court holds the rate provision is not a binding valid rate contract; the federal question is made that as a rate ordinance it violates the 14th Amendment of the Constitution of the United States.

TREATING RATE ORDINANCE OF MARCH 3,  
1903, AND ACCEPTANCE THEREON ON  
APRIL 1, 1903, AS A CONTRACT.

If the rate ordinance of March 3, 1903, and acceptance thereof on April 1, 1903, is held to be a contract the jurisdiction of this Court is invoked to determine what obligations arose from it and whether these obligations have been impaired.

The amount of the impairment is immaterial, if there is any, it is sufficient to bring into activity the judicial power of this Court.

Farrington vs. Terry, 95 U. S. 693.

The Acts of the Legislature of Georgia (Georgia Laws, 1914, page 703, and Georgia Laws, 1916, page 618) extended the corporate limits of Decatur towards the City of Atlanta, so as to include part of the Main or North Decatur line built on a private right of way, owned by the street railway company, and under a franchise granted by the County of DeKalb. But for these annexation Acts the 5 cents rate of fare of the contract of March 3, 1903, and acceptance thereof on April 1, 1903, would not apply to such added portion of the line, but there would be an undisputed right resting under the franchise contract with DeKalb County to charge 7 cents over this portion of the line. It is only because of these subsequent legislative acts that this is prevented. That is the effect given to this act. The judgment of the court below requiring a 5 cents rate of fare over this portion of the line rests on this act; without the act such judgment would not and could not have been rendered. It will thus be seen that this act and the effect given it impairs the contract right held by the street railway companies with DeKalb County and also adds to the contract of March 3, 1903, and the acceptance thereof on April 1, 1903, in violation of Article 1, Section 10 of the Constitution of the United States.

Detroit United Ry. Co. vs. Michigan, 242 U. S. 238.

United States vs. Memphis, 97 U. S. 284.

That the decision of the State court may not mention the Act in question is immaterial as the decision itself gave effect to the annexation acts.

Houston vs. Texas C. Rd. Co. vs. Texas, 177 U. S. 66, 77.

Similarly, the contract of April 1, 1903, does not require the issuing of transfers from all points in Decatur to all points in Atlanta for 5 cents, but the orders of the Railroad Commission of the State of Georgia require the issuing of universal transfers for the 5 cents fare to any party boarding the line within the present limits of the Town of Decatur, although under the commission's orders as to transfers all other patrons (other than the Decatur patrons) pay 7 cents before they can receive a transfer. The Commission's order thus unconstitutionally impairs the obligation of the contract by adding to its burdens.

Detroit United Ry. Co. vs. Michigan, 248 U. S. 429, 436, 437.

Similarly, the Railroad Commission of Georgia by its order extends the 5 cents fare provision to other points than called for by the contract and also, by its orders, the quality and quantity of service is increased beyond that contemplated and required by the contract.

These different commission's orders are attacked as violative of Article 1, Section 10 of the Constitution of the United States, as they are the same as legislative acts.

Arkadelphia Milling Co. vs. St. L. S. S. W. Ry. Co., 249 U. S. 134.

## OTHER FEDERAL QUESTIONS RAISED.

The Acts of 1907, page 73 et seq., are construed by the State Court as conferring jurisdiction upon the Commission to issue the orders attacked. It is only because of this act, that the State Court holds the Commission had power and authority to pass the orders in question, giving such construction and effect to this Act; the Act is attacked as impairing the obligations of the contract in violation of Article 1, Section 10 of the Constitution of the United States; a federal question for determination by this Court.

Detroit United Railway Co. vs. Michigan, 242 U. S. 238.

The federal question is further raised that the Act of 1907, page 73 et seq., as construed by the State court, violates the 14th Amendment of the Constitution of the United States, in that said Act denies the Railroad Commission of the State of Georgia power to change the 5 cents rate of fare in the contract, although it confers upon the commission the power to increase the quality and quantity of service, and to require the issuing of transfers; and gives the commission jurisdiction to make the rate of fare provided for in the contract, operative from other points from that specified in the rate contract. The Act thus construed confiscates the property of the Street Railway Company.

Mississippi Railroad Commission vs. Mobile R. Co., 244 U. S. 388.

Washington & C. Ry. Co. vs. Macgruder, 198 Fed. 218 (3, 4).

Similarly each of the orders of the Commission complained of unconstitutionally confiscates the property of the street railway companies. (244 U. S. 388; 198 Fed. Rep. 218 (3, 4).

If the Railroad Commission increases the rate of fare of other patrons because of their confiscatory orders as to Deactur traffic, the individual intervenors are denied the equal protection of the law and their property is confiscated in violation of the 14th Amendment of the United States Constitution. The individual intervenors contend that the Act of 1907, page 73 et seq., and the orders of the Georgia Railroad Commission unconstitutionally discriminate against them.

The federal question is raised that the Act of 1907 page 73 et seq., amended by the Act of August 18, 1919 (Georgia laws, 1919, page 94), as construed by the State court is class legislation in violation of the 14th Amendment of the Constitution of the United States.

It is unquestioned that the Legislature of the State of Georgia can place all rates and rate contracts under the jurisdiction of the railroad commission of the State of Georgia. Legislative discrimination and class legislation is produced by the Act in question by placing some contracts and withholding others (without distinction as to classification) under the jurisdiction of the Railroad Commission of the State of Georgia.

Traux vs. Corrigan, Co-Op. Advance Sheets, January 16th, 1922, page 132 (see pages 139-142).

Advance sheets, Supreme Court, January 16, 1922, page 124.

Lake Shore & Michigan So. Ry. vs. Smith, 173 U. S. 684.

Chicago R. I. & P. Ry. Co. vs. Ketchum, 212 Fed. 986.

L. & N. R. R. Co. vs. R. R. Com. of Tenn., 19 Fed. 693, 695.

Cotting vs. Goddard, 183 U. S. 79.

Union Sewer Pipe Co. vs. Connelly, 99 Fed. 354, affirmed in 184 U. S. 548.

Western Ry. of Ala. vs. Rd. Com. of Ala., 197 Fed. Rep 954 (5, 6).

Gulf Colorado & Santa Fe Ry. Co. vs. Ellis, 165 U. S. 150, 165.

On the other hand if the rate provision of March 3rd, 1903, and acceptance of April 1, 1903, could be held to be a separate and distinct classification of rates and service, the federal question is raised that petitioners are deprived of their property in violation of the 14th Amendment of the Constitution of the United States; for that such effect is given to the contract as to compel the street railway company perpetually to carry the Decatur traffic at a confiscatory rate, though the contract had no specific time of duration and the electric companies seek to rescind and give up all its rights under and by virtue of the contract and remove its Main or North Decatur line from Decatur.

Vandalia R. R. Co. vs. Schnull, 255 U. S. 131.

Brooks-Scanlon Co. vs. R. R. Com. of La., 251 U. S. 291, 399.

Detroit V. Ry. vs. People of State of Michigan, 238 U. S. 340, 346.

See also:

Jones vs. Newport News & M. V. Co., 65 Fed. Rep. 736, 741.

WALTER T. COLQUITT,  
LUTHER Z. ROSSER,  
J. PRINCE WEBSTER,  
Attorneys for Petitioners.

The foregoing notice is hereby accepted and delivery of a copy thereof and the petition for certiorari and brief in support of the petition, are hereby acknowledged. This June 26th, 1922.

J. HOWELL GREEN,  
HARWELL, FAIRMAN & BARRETT,  
FRANK HARWELL,  
Attorneys for Town of Decatur.

IN THE SUPREME COURT OF THE  
UNITED STATES  
OCTOBER TERM 1921.

---

GEORGIA RAILWAY & POWER  
CO., GEORGIA RAILWAY &  
ELECTRIC CO., and R. C. HACK- }  
MAN, C. H. KNOX, G. R. MAC- }  
NAMARA, J. T. BRASWELL, C. }  
A. VIRGIN, J. D. MALSBY, C. M. }  
BINDER, J. L. MURPHY, J. R. }  
HARDIN, H. M. ASHE, P. E. }  
DAVIS, C. E. BENNETT, W. E. }  
FIELD, H. E. HAWN, DAVID }  
HAWN, F. McDONALD, JR., and }  
J. C. GORMAN, }  
Petitioners,  
Vs.  
TOWN OF DECATUR, }  
Respondent.

Come now the above named petitioners, by their Counsel, and move this Honorable Court that it shall, by certiorari or other proper process, directed to the Supreme Court of the State of Georgia, require said Court to certify to this Court for its review and determination, a certain cause in said Supreme Court of Georgia lately pending, wherein Petitioners above named were the Plaintiffs in Error, and the above named Respondent, was the Defendant in Error, and to that end they now tender herewith their petition

and brief, with a certified copy of the entire record  
in said Supreme Court of Georgia.

WALTER T. COLQUITT,  
LUTHER Z. ROSSER,  
J. PRINCE WEBSTER,  
Attorneys for Petitioners.

Office Supreme Court

FILED

APR 16 192

WM. R. STANSB

**Supreme Court Of The United States**

**October Term 1922**

**No. 463**

GEORGIA RAILWAY AND POWER COMPANY et al.,

Plaintiffs in Error and Petitioners in Certiorari,

vs.

THE TOWN OF DECATUR, Defendants in Error and Respondents in Certiorari.

**FROM THE SUPREME COURT OF THE  
STATE OF GEORGIA.**

**Reply Brief of Plaintiffs in Error and Petitioners in  
Certiorari.**

L. Z. ROSSER,

J. PRINCE WEBSTER,

WALTER T. COLQUITT,

Attorneys for Plaintiffs in Error and  
Petitioners in Certiorari.

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**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1922.**

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**GEORGIA RAILWAY & POWER  
COMPANY, ET AL.,**

Plaintiffs in Error and Peti-  
tioner in Certiorari,

vs.

**THE TOWN OF DECATUR,**

Defendants in Error and Re-  
spondents in Certiorari.

No. 463

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**REPLY BRIEF OF PLAINTIFFS IN ERROR AND  
PETITIONERS IN CERTIORARI.**

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I.

The contention of defendant in error (in its brief, pages 13 and 14) that the decision of the Supreme Court of Georgia, affirming the granting of an interlocutory injunction was a final adjudication, from which the writ of error should have been sued out, is not a motion to dismiss the bill of exceptions as there was no compliance with the provision of the sixth (6) rule of this Court.

The contention itself is without merit.

Southern Ry. Co. vs. Clift, Decision (No. 107) rendered December 4th, 1922.

The judgment of the trial court granting or refusing the temporary injunction, and the affirmance of such judgment by the Supreme Court of Georgia is not a final judgment or decree in the case.

Atlanta Trust & Banking Co. vs. Nelms, 119 Ga. 630 (1).

(1).

The only effect of such judgment is that points of law decided by the court are followed by the State court, in the subsequent trial of the case.

Atlanta Trust & Banking Co. vs. Nelms, 119 Ga. 630 (1).

(1).

The demurrers cannot be passed upon at such hearing.

Milltown Mfg. Co. vs. Bray & Co., 149 Ga. 151 (2).

Mack vs. Westbrook, 148 Ga. 691.

Bank of Soperton vs. Empire Trust Co., 142 Ga. 34, 35 (3).

A final judgment or decree is not rendered until the verdict and a final decree is entered thereon.

Georgia Code 5421.

Georgia Code 5500.

Southern Cotton Oil Co. vs. Overby, 136 Ga. 69 (3).

(2a) The court has no power to grant a final judgment or decree upon an interlocutory hearing.

Triumph Ice Machinery Co. vs. Sandersville Ice Co., 147 Ga. 468 (2).

Weaver vs. Bank of Bowersville, 146 Ga. 195.

Oostanula Mining Co. vs. Miller, 145 Ga. 90, 91 (c).

Teautonio Club vs. Howard, 141 Ga. 79 (2).

Wrists of error will only lie from this Court to review "a final judgment or decree from the highest court of the State in which a decision in a suit can be had."

Judicial Code, Section 237.

Missouri K. & I. R. Co. vs. Olathe, 222 U. S. 185.

As to what is a final judgment or decree to which a writ of error will lie; see

Haseltine vs. Central National Bank, 183 U. S. 130;

Clark vs. Kansas City, 172 U. S. 334;

Schlosser vs. Hemphill, 198 U. S. 173;

Chesapeake R. Co. vs. McCabe, 213 U. S. 207.

In Georgia even a verdict not followed by a judgment entered thereon is not res adjudicata.

Walden vs. Walden, 124 Ga. 145, 146.

## II

### JUDGMENT IN MANDAMUS CASE IS NOT RES ADJUDICATA OR ESTOPPEL.

The contention of defendant in error (pages 61-67 of its brief) is untenable in law and in fact.

The mandamus case was one brought by the Georgia Railway & Power Company against the Railroad Commission of Georgia to compel the Commission to fix street rail-

way fares, under and by virtue of the Acts of 1907. It was not an equitable suit (page 67 of brief of defendant in error).

In Georgia such action is one strictly on the common law side of the court.

*Gay vs. Gilmore, 76 Ga. 725.*

*Wheeler vs. Walker, 55 Ga. 258, 259.*

The parties to the case at bar and in the mandamus case are not the same.

The contentions made and the questions raised are essentially different. Some of the contentions in the case at bar which were not raised in the mandamus case are (a) whether certain State and Federal constitutional provisions prevented the claimed contract sued upon from being enforceable as a contract; (b) whether the claimed rate contract was at will and terminated by timely notice; (c) whether the street railway company had power or authority to enter into binding rate contracts; (d) whether the claimed contract was or is discriminatory and therefore illegal and unconstitutional; (e) whether the claimed contract is a contract to fix fares without the limits of the municipality; (f) whether the claimed contract, by subsequent legislative acts, was extended to territory taken into the municipal limits of Decatur; (g) the confiscatory character of the claimed contract in connection with the orders of the Commission increasing service and requiring transfers; (h) if a rate contract existed—whether it and other contracts with DeKalb County were unconstitutionally impaired by subsequent orders of the Railroad Commission of Georgia and subsequent legislative acts; (i) the right of the Street Railway Company under the 14th Amendment to the Constitution of the United States to cease all operations of the Main Decatur line within the

territory of Decatur; (j) whether the Act of 1907 and its amendments as construed by the Court rendered said act unconstitutional.

The right to review the mandamus suit was granted in the case at bar, and is not res adjudicata.

### III.

#### FEDERAL QUESTIONS NECESSARILY INVOLVED IN DECISION OF STATE COURT.

The defendant in error contends that the decision of the State Court "is based upon the want of authority of the Georgia Railway & Power Company to fix fares under the Constitution and Statutes of Georgia," a non-federal question. (Pages 12-14 of its brief.)

If the Constitution of the State of Georgia forbids a street railway company from fixing fares it must necessarily follow that a street railway company could not enter into a binding rate contract. (See former brief of plaintiffs in error, pages 29-31.)

The case at bar was instituted by defendant in error upon a claimed contract fixing a 5 cents rate of fare. If no contract for fares existed the rate of fare sought to be continued by injunction was confiscatory and attacked as violative of the 14th Amendment of the Constitution of the United States (a federal question).

The verdict of the jury (directed by the Court), the final judgment and decree make the 5 cents rate of fare applicable to territory taken into the municipal limits of Decatur by subsequent Legislative Acts (Acts 1914 and 1916). The verdict, judgment and decree gave force and effect to these acts. The Federal question is raised whether these acts, as

thus construed and enforced, unconstitutionally impaired the claimed contract sued upon, and other contracts of the street railway companies with the County of DeKalb.

Columbia Ry. Gas & Elec. Co. vs. S. C., decided by this Court Feb. 19, 1923 (No. 297) Co-Operative Advance Sheets March 15, 1923, page 289.

See also former brief of plaintiffs in error, pages 23, 24, 29 and 50.

Other Federal questions raised and passed upon by the judgment on the demurrers and the decree are discussed in the main brief of Plaintiffs in Error.

#### IV.

### CONSTITUTION OF GEORGIA DOES NOT GIVE MUNICIPALITIES POWER TO MAKE RATE CONTRACTS.

Defendant in error contends that authority to enter into a rate contract is derived from the State Constitution (brief of defendant in error, pages 22-36).

Quoting defendant in error's brief (page 36) "The Town of Decatur \* \* \* (in entering into the 5 cents fare contract) was not acting under the authority of the legislature, but independently of the legislature, and under the Constitution itself."

The Constitutional provision referred to, Georgia Code Section 6448 provides:

"The General Assembly shall not authorize the construction of any street passenger railway within the limits of

any incorporated town or city, without the consent of the corporate authorities."

It confers no authority upon a municipality to enter into rate contracts. A constitutional grant of authority cannot be limited, modified or destroyed by subsequent legislative action.

That the Legislature of the State of Georgia can at any time it sees fit change the rates in question, admitted repeatedly by defendant in error in their brief, (pages 26, 27, 39 and 97 of their brief) conclusively shows that a municipality has no contractual authority to enter into rate contracts.

The constitutional provision in question does not confer authority upon municipalities subject to subsequent legislative action. It is either an absolute grant of power to contract as to rates or none whatever is conferred thereby. As it is admitted that the legislature has supreme power over rates, there is no constitutional grant to municipalities with reference thereto.

All the courts in the construction of such provisions hold that they cannot be appealed to by municipalities as authority to legislate or contract as to rates. They are merely a limitation upon the power of the Legislature.

City of Mitchell vs. Board of R. R. Com., 184 N. W. 246;

Hayne vs. Chicago & O. P. Elev. Co., 128 N. E. 587;  
Southwest Missouri R. Co. vs. Public Service Com., 219 S. W. 380;

Virginia Western P. Co. vs. Clifton Forge, 99 S. E. 732.

See also Knoxville Gas Co. vs. City of Knoxville (Circuit Court of appeals Sixth Circuit) 261 Fed. Rep. 283.

The constitutional provisions in the cases above cited contain provisions both as to construction and operation and some provide that the consent shall be upon such terms and conditions as may seem proper to local authorities. The Georgia constitutional consent provision is confined to **construction** alone.

This constitutional provision cannot be appealed to as giving the municipality authority to contract as to rates outside of and beyond its territorial limits.

City of Pasadena vs. Los Angeles Terminal Co., 41 Pac. 1093;

Koehn vs. Public Service Com., 176 N. Y. Supp. 147;

City of Arcata vs. Green, 106 Pac. 86.

Galveston & W. Ry. Co. vs. Galveston, 39 S. W. 920.

Defendant in error also, as it must, concedes that in Georgia a municipality has no power or authority to regulate rates, (brief of defendant in error, pages 38-39) "regulation under the Constitution of Georgia is lodged **solely** in the Legislature or by delegation in its agent the Railroad Commission," (page 38) \* \* \* "Furthermore, a City in Georgia cannot by contract fix a rate irrevocable by the State, since under the Constitution of Georgia the power to regulate rates is lodged in the General Assembly and the exercise of the police power of the State shall never be abridged." (Page 39.)

These admissions negative any power on the part of the municipality to contract as to rates.

In *Horkan vs. City of Moultrie*, 136 Ga. 561, 563, the Court in passing upon the question whether municipalities had the right to enter into rate contracts said, "If this could not be done by ordinance, of course it could not be done by contract."

This Court has repeatedly held that for a municipality to contract as to rates it must show express authority therefor and that such power must be more explicitly conferred than the right to regulate and states the reason for such rule.

*Home Tel. Co. vs. Los Angeles*, 211 U. S. 265, 273; *Milwaukee Elec. R. & Light Co. vs. Railroad Commission*, 238 U. S. 174.

It is a primary rule that cities can exercise no power that has been by statute or constitution reserved to the State.

Defendant in error admits that the Constitution of the State of Georgia reserves to the State and has lodged in the Legislature of the State, the sole and exclusive power to regulate rates.

It is further admitted that the police provision of the Georgia Constitution bars the State itself from making a rate contract.

The State itself cannot make a rate contract. All the power of a municipality is drawn from the State through its Legislature. If the State itself cannot make rate contracts, then surely it cannot grant what it does not have to cities.

In support of its contention defendant in error says that a municipality's right to enter into rate contracts is analogous to the right of a State to legislate upon matters of interstate commerce until Congress itself has legislated

with reference thereto. (Defendant in error's brief, page 34.)

Such contention overlooks the distinction between the inherent sovereign power of a State and the delegated authority of the United States and the further well recognized legal principle that municipalities possess **only** such powers as are explicitly granted them by the State or are necessarily implied from those granted.

Collins vs. Mayor, 69 Ga. 542.

Lofton vs. Collins, 117 Ga. 434 (438).

Walker vs. McNelly, et al., 121 Ga. 114.

Lockwood vs. Muhlberg, 124 Ga. 662.

Frank vs. City of Atlanta, 72 Ga. 428.

Mayor, et al., vs. Wilson & Gibson, 49 Ga. 476.

The failure of the Legislature of Georgia to grant the Municipality the right to regulate or contract as to rates, is equivalent to a denial of such municipal power.

Ottumwa Ry. & Light Co. vs. City of Ottumwa, 178 N. W. 905, where the decisions of this and other Courts on this subject are cited and collected.

Defendant in error refers to Section 2600 of the Code of Georgia (brief page 22). The provision contained in such Section; street railway "shall be subject to all just and reasonable rules and regulations by the corporate authorities," cannot be looked to as giving a municipality any power or authority to make rate contracts. The words used are not such as are used in granting contractual power. This provision does not undertake to give cities or towns any new power, contractual or otherwise, which had not otherwise been conferred by the legislature. It simply reserves the right to impose reasonable operative rules.

V.

NO ESTOPPEL ON QUESTION OF WANT OF AUTHORITY OF STREET RAILWAY COMPANY AND MUNICIPALITY TO ENTER INTO CLAIMED RATE CONTRACTS.

If no authority to contract as to rates has been delegated to the municipalities or the street railway companies the claimed rate contract cannot be upheld by estoppel.

The rule with reference to estoppel is stated by this Court in the case of Central Transfer Co. vs. Pullman Car Co., 139 U. S. 60.

See also

Thomas vs. United States, 101 U. S. 71 (4).

Armour Packing Co. vs. United States, 209 U. S., page 56.

To the same effect see the following Georgia cases:

Macon Consolidated Street Railroad Co. vs. Mayor and Council of the City of Macon, 112 Ga. 782.

Town of Wadley vs. Lancaster, 124 Ga. 354.

Horkan vs. City of Moultrie, 136 Ga. 561.

Neal vs. Town of Decatur, 142 Ga. 205.

Wright, Executor vs. Pelham & Havanna R. Co., 18 Ga. App. 195.

Respectfully submitted,

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Atlanta, Ga.

GEORGIA RAILWAY & POWER COMPANY ET AL.  
*v.* TOWN OF DECATUR.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 463. Argued April 24, 25, 1923.—Decided June 4, 1923.

1. A judgment of a State Supreme Court which does not terminate the litigation between the parties in such manner that, should there be an affirmance here, the court below would have nothing to do but to execute the judgment it had rendered, is not a final judgment for the purpose of review in this Court, even though it be regarded by the state court as settling the law of the case. P. 436.
2. Upon review of a judgment of a State Supreme Court, its decision upholding the power of a municipality of the State, under the local constitution and laws, to enter into a rate contract with a street railway company is controlling upon this Court. P. 437.
3. But in deciding constitutional questions presented, this Court will determine for itself whether there is, in fact, a contract, and, if so, the extent of its binding obligations, but will lean to an agreement with the state court. P. 438.
4. A street railway company cannot avoid the obligation to abide by maximum rates fixed by a valid contract with a town, by showing that they have become confiscatory. P. 438.
5. A state statute extending the corporate limits of a town and construed by the State Supreme Court as having the effect of rendering applicable to the added territory maximum street railway rates fixed by an earlier contract between the town and the street railway company, impairs the obligation of the contract by adding to its burdens. P. 439.
6. In the absence of any showing that the classification is in fact unreasonable and arbitrary, a statute which empowers a commission to revise the rates of street railway companies as they may be fixed by future contracts with municipalities, but not those fixed by contracts existing when the statute passed, cannot be said to violate the Equal Protection Clause of the Fourteenth Amendment, as applied to a company whose contract is thus excepted and prescribes a maximum rate which the company claims to be inadequate. P. 439.
7. An order of a state commission requiring a street railroad company to continue issuance of transfers and to provide additional

seating capacity and trailer cars, upheld against constitutional objection, in view of obligations imposed by a contract between the company and a municipality and the powers of the commission. P. 439.

153 Ga. 329, reversed; certiorari denied.

ERROR to a judgment of the Supreme Court of Georgia affirming a decree for the Town of Decatur, in its suit to enjoin the plaintiffs in error from increasing the fare on a street car line in violation of a contract.

*Mr. Walter T. Colquitt*, with whom *Mr. Luther Z. Rossler* and *Mr. J. Prince Webster* were on the briefs, for plaintiffs in error.

*Mr. J. Howell Green* and *Mr. Frank Harwell* for defendant in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The defendant in error, plaintiff below, brought suit against the Power and Electric Companies, defendants below, to enjoin them from increasing the rate of fare on a line of street railway between Decatur and the City of Atlanta. Hackman and others intervened, asserting that they resided near Atlanta and used certain car lines of defendant going to and from Atlanta, upon which a seven-cent fare was exacted; and that the contract, hereinafter referred to, giving residents of Decatur a lower rate of fare, constituted an illegal discrimination against them and against the localities where they lived. They did not allege that the seven-cent fare was unreasonable; nor did they seek any change in that rate; but merely joined with defendants in praying that the contract be held void and of no effect.

The Electric Company was the owner and the Power Company the lessee of the lines involved. About the year 1902 the Electric Company owned three lines be-

tween Atlanta and Decatur. Desiring to abandon the most northerly of these lines, the company began to tear it up. Thereupon suit was brought for an injunction. The controversy was adjusted by an agreement between the company and the Town of Decatur, by which the company was allowed to remove its line and an ordinance was enacted, carrying the agreement into effect. This ordinance, which was formally accepted, bound the company "to never charge more than five cents for one fare upon its main Decatur line . . . for one passenger, and one trip upon its regular cars from the terminus of said line in the City of Atlanta to the terminus of the same in the Town of Decatur, or from the terminus of said line in the Town of Decatur to the terminus of the same in the City of Atlanta . . ." and "to grant one transfer ticket upon the payment of one full fare for the purpose of giving one continuous ride from any point within the Town of Decatur . . . to any point within the City of Atlanta, on any of its lines in said city, and vice versa." In pursuance of this agreement the company tore up, removed and abandoned the northerly line and has never since restored it.

The company maintained a five-cent fare until October, 1920, at which time it gave notice that the fare would be increased to seven cents. Prior thereto an application of the company to the Railroad Commission of Georgia for permission to make this increase had been denied, on the ground that, because of the contract, the commission was without jurisdiction. The company then sought by mandamus to compel the commission to assume jurisdiction of the question; but the application was denied by the trial court, whose ruling was affirmed by the Supreme Court of the State, in so far as it related to the line covered by the contract. The present suit against the defendants was predicated upon the foregoing facts. The contentions of the defendants were that the execution of the con-

tract was beyond the powers of the town; that permission to remove and abandon the northerly line furnished no consideration for it; that it constituted an attempt to fix fares outside the corporate limits of the town; that since it was entered into, these limits had been twice extended so as to include a portion of the main line, outside the corporate limits when the contract was entered into; and that the contract could not be applied to this additional territory without impairing its obligation, in violation of the Constitution of the United States. They further contended that, in any event, the five-cent fare should be limited to passengers entering cars at the termini of the line in Atlanta and Decatur and not to those entering at intermediate points; and that, because of changed conditions since the contract was made, the five-cent fare was confiscatory. Upon an application made by the defendants, after the disposition of the mandamus proceeding, the Railroad Commission had fixed a seven-cent fare on lines not covered by the contract and required the defendants to furnish, during rush hour periods, additional seating capacity, and, on the main Decatur and College Park routes, to operate trailers during such rush hours. The commission had also ordered that no change should be made in the existing rules and practices of the company as to transfers.

The trial court made an interlocutory order, granting a preliminary injunction, which was affirmed on writ of error by the State Supreme Court. 152 Ga. 143. Thereafter, the case having been remanded, defendants were allowed to amend their answer and crossbill in several particulars. A general demurrer to these amended pleadings was sustained in part; and a jury, impaneled to try the remaining issues, found for the plaintiff by direction of the court, upon which a final decree was entered. A second writ of error from the State Supreme Court followed. That court held that its judgment upon the first

writ of error became the law of the case and was *res judicata* and therefore precluded a further review and the decree of the trial court was affirmed. 153 Ga. 329. Deprivation of rights under the Federal Constitution was duly and properly asserted. The case is here on writ of error. From motives of caution defendants also filed a petition praying the issuance of a writ of certiorari, consideration of which was postponed to await the hearing on the writ of error.

Preliminarily, defendant in error insists that the decision of the State Supreme Court on the first writ of error affirming the interlocutory order of the trial court, was a final adjudication from which a writ of error from this Court might have been sued out, and, hence, that we are precluded from considering the present writ of error. *Rio Grande Western Ry. Co. v. Stringham*, 239 U. S. 44, is cited and relied upon; but that case furnishes no support to the contention. There the trial court had adjudged the title to a piece of land to be in the defendant. Upon appeal the State Supreme Court reversed this judgment and remanded the case with directions to enter judgment awarding plaintiff title to a right of way over the land. The trial court followed this direction. Plaintiff again appealed, insisting, as it had done before, that it had title in fee simple; but the appellate court declined to consider the question, holding that the former decision concluded the court as well as the parties. This Court held that as the judgment on the first appeal disposed of the whole case on the merits and directed that judgment should be entered, it left nothing to the judicial discretion of the trial court and was therefore final. Here the first writ of error was not from a final judgment, but from an interlocutory order granting a temporary injunction. That it did not finally dispose of the case is clear, since the trial court thereafter allowed amendments, ruled on a demurrer, impaneled a jury, directed a verdict and entered a

final decree; and it was upon this decree that the second writ of error was brought. We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error and its powers brought to an end; but whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review is the only one this Court can consider as final, for the purpose of exercising its appellate jurisdiction. *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343; *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84, 93; *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 214; *Zeckendorf v. Steinfield*, 225 U. S. 445, 454. While prior decisions on the subject of what constitutes a final judgment are not entirely harmonious, the rule is established that in order to give this Court appellate jurisdiction the judgment or decree "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Bostwick v. Brinkerhoff*, 106 U. S. 3, and cases cited.

We hold, therefore, that the writ of error was properly brought and come to a consideration of the substantive matters presented.

1. The principal question, and the one to which the briefs and arguments are mainly directed, is, whether the agreement between the plaintiff and the Electric Company was within the powers of the town and is now valid and subsisting. This contract has been before the Supreme Court of Georgia in the course of the litigation on three distinct occasions: 149 Ga. 1; 152 Ga. 143, and (the instant case) 153 Ga. 329. That court, in carefully considered and well reasoned opinions, sustained the authority of the municipality and upheld the contract as valid and subsisting. Defendants contend that the au-

thority to fix rates devolved by the state constitution upon the General Assembly, and, therefore, that the Town of Decatur was without power to enter into a contract on that subject. When the contract was made the General Assembly had never exercised this authority and the State Supreme Court held that there was nothing in the constitution of the State which precluded the municipality from contracting as to fares; and that, while the matter was one falling within the police power, whose exercise could not be abridged by contract, it was competent for the municipality to enter into such a contract where the State had not exercised and was not seeking to exercise its police power over the subject, and that this contract would remain effective until there should be conflicting legislative action. See *Milwaukee Electric Ry. Co. v. Wisconsin R. R. Comm.*, 238 U. S. 174, 183. This conclusion, involving, as it does, a construction of the state constitution and laws and powers of state municipalities, is controlling upon this Court, as it has decided many times. See, for example: *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116; *Claiborne County v. Brooks*, 111 U. S. 400, 410; *Richmond v. Smith*, 15 Wall. 429, 438.

On the other hand, in deciding the constitutional questions presented, this Court will determine for itself whether there is, in fact, a contract and, if so, the extent of its binding obligations, but will lean to an agreement with the state court. *Tampa Water Works Co. v. Tampa*, 199 U. S. 241, 242-243, and cases cited; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 595; *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 386; *Milwaukee Electric Ry. Co. v. Wisconsin R. R. Commission*, *supra*. And considering the question in this light we see no reason to differ with that court in its view of the validity and binding quality of the contract. The contract being valid we are not concerned with the question whether the stipulated rates are confiscatory. *Southern*

*Iowa Electric Co. v. Chariton*, 255 U. S. 539, 542; *Paducah v. Paducah Ry. Co.*, 261 U. S. 267.

2. Treating the contract as valid, it is insisted that its obligation is impaired by the statutory extension of the limits of the town and the action of the court in holding the five-cent fare applicable in the added territory. While the statute does not refer to the contract or in terms make the rates applicable in the annexed territory, the necessary result of the decision of the state courts is to give it that effect, and in that way the statute, in the respect complained of, does substantially impair the obligation of the contract by adding to its burdens. *Detroit United Railway v. Michigan*, 242 U. S. 238, 247-248; *Columbia Railway, Gas & Electric Co. v. South Carolina*, 261 U. S. 236.

3. The state statute of August 23, 1907, Civil Code, § 2662, extends the power of the Railroad Commission to street railroad companies, but contains a proviso to the effect that it shall not be construed "to impair any valid, subsisting contract now in existence between any municipality and any such company." It is insisted that this proviso brings about an arbitrary classification, in violation of the equal protection clause of the Fourteenth Amendment, because it subjects future contracts to the power of the Commission while exempting existing contracts therefrom. But it is not shown that the classification in fact is unreasonable and arbitrary and, under the decisions of this Court, we cannot say that it is obnoxious to the constitutional provision. *Arkansas Natural Gas Co. v. Arkansas Railroad Commission*, 261 U. S. 379, and cases cited.

4. We cannot agree with the contention of defendants that the order of the commission, directing that no change be made in the matter of the issuance of free transfers is open to constitutional objection. The order of the com-

mission went no further than to direct a continuance of a practice which, so far as the record discloses, was not beyond the terms of the contract providing specifically for such transfers.

Neither are we able to say that the order of the commission, directing the defendants to provide additional seating capacity on some of its lines and trailers upon the line covered by the contract, was beyond its ordinary power to require adequate service. There is nothing in the contract with which the order conflicts, and such service naturally would seem to be implied, in the absence of a provision to the contrary.

5. Other contentions advanced by defendants we find so clearly lacking in merit that we dismiss them without special consideration.

It results from the foregoing that the judgment below, in so far as it makes applicable the contract rates within the annexed territory cannot be sustained. The contract rates apply only to the Town of Decatur, as it existed when the contract was made. To apply them to additional territory is to impose a burden upon defendants outside the contract. We find no other error; but, upon the ground stated under paragraph 2, the decree of the State Supreme Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

*Reversed.*

*Writ of certiorari denied.*